Supreme Court, U.S.
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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

GLORIA SARNO, G.M.F.C., INC.,
GLORIA MARSHALL SALON OF TORRANCE,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ of Certiorari
To The Second District Court Of Appeal
Of The State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Los Angeles trial court entered a $400,000 judgment and a permanent injunction against Petitioners the instant they were made parties (their names were written into the judgment after a trial between Respondent and named defendants of that action). The trial court stated that Petitioners were in an alter ego relationship with the corporate defendant but never gave Petitioners the opportunity to dispute this allegation. Petitioner's complaint in equity to have the judgment set aside as void for lack of jurisdiction was dismissed by the trial court.

1. Is it consistent with the Due Process Clause of the Fourteenth Amendment of the Constitution to deny non-parties all meaningful opportunity to be heard before or after adding them to a substantial judgment and prior to permanently depriving them of substantial property interests?

2. Did the California Court of Appeal err in not following the recent unanimous Supreme Court holding in Donald E. Nelson v. Adams USA, Inc. (April 25, 2000) ___ U.S.___, 120 S.Ct. 1579, 146 L.Ed.2d 530, which held that due process affords every party the opportunity to defend?

3. Should the holding in Donald E. Nelson v. Adams USA, Inc. (April 25, 2000) ___ U.S.___, 120 S.Ct. 1579, 146 L.Ed.2d 530, be extended to apply to non-parties named based upon an alleged alter ego relationship with a corporate party?

4. Is California's Code of Civil Procedure §187 (broad powers given to judicial officers to make suitable orders to enforce judgments) unconstitutional as violative of one's federal due process rights when applied to enter a judgment against someone the instant the person is made a party to the proceeding?

LIST OF PARTIES

The parties to this Petition are Gloria Sarno (formerly known as Gloria Bergendahl nee Gloria Marshall), G.M.F.C., Inc, a California Corporation, Gloria Marshall Salon of Torrance, a California general partnership (Petitioners), and People of the State of California (Respondent).

Additional parties in the proceedings below but not parties to this Petition include State of California, County of Los Angeles, Los Angeles County Sheriff's Department (named parties to trial court proceedings below, #BC202691, but not to any appeals), Gloria Marshall Figure Salons of Australia Pty. Ltd., an Australian Corporation, and G.M.F.C. (Aust.) Pty. Ltd., an Australian Corporation (named parties to trial court proceeding below and to appeal to Second District Court of Appeal for the State of California, #B130037, but not to the California Supreme Court#S089232).

Additional parties not a part of the proceedings directly below but which were named parties to the companion case, #BC121888, include Gloria Marshall America, Inc., a California corporation, F.B.S., Inc., a California corporation, Mark Bergendahl and his wife, Kellee Bergendahl (named Defendants to original action). Additional parties not a part of the proceedings directly below but became parties to the companion case #BC121888 upon entry of judgment include Redfield Taylor Associates, Inc., Gloria Marshall of Utah, Inc., Gloria Marshall International, Inc., and International Health Industries Ohio, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner G.M.F.C. is a private corporation organized and existing under the laws of the State of California. Petitioner G.M.F.C. does not have a parent corporation nor does any publicly held company own 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners GLORIA SARNO, G.M.F.C., INC., and GLORIA MARSHALL SALON OF TORRANCE, respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the Second District Court of Appeal for the State of California entered on May 9, 2000.

OPINIONS BELOW

The opinion and judgment of the Second District Court of Appeal for the State of California (#B130037) filed May 9, 2000 affirming the order of the trial court can be found at Appendix pages 3 through 12[1]. the court's denial of Petitioners' petition for rehearing can be found at App. 2. The Supreme Court for the State of California's (#S089232) denial of Petitioners petition for discretionary review is contained at App. 1. The order of the superior court of California for the County of Los Angeles (#BC202691) of March 2, 1999 which ordered the dismissal of Petitioners' action of March 2, 1999 can be found at App. 13 - 14. The order of the superior court of February 8, 1999 sustaining Respondent's demurrer to Petitioners' First Amended Complaint without leave to amend can be found at App. 15 - 16.

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeal for the Second District Court of Appeal of the State of California was entered on May 9, 2000 (App. 12) and the Order of the California Supreme Court denying Petitioner's petition for discretionary review was filed July 26, 2000 (App. 1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

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[1] "App." shall mean the separate volume of appendices.

CONSTITUTIONS AND STATUTES INVOLVED IN THE CASE

Amendment 14, Section 1, Clause 3 of the United States Constitution (App. 70 - 71); California Code of Civil Procedure §187 (App. 71).

STATEMENT OF THE CASE

On February 14, 1995, Respondent commenced a lawsuit against F.B.S., Inc.[2], a California corporation, Gloria Marshall America, Inc.[3], a California corporation, Mark Bergendahl, and Kellee Bergendahl[4], alleging various deceptive business practices (#BC121888). Full ownership of all stock of F.B.S., Inc. was held by Defendants Mark and Kellee Bergendahl.

From the inception of the lawsuit through the date of the trial (April 1997), Respondent sought discovery from the defendants and also from several non-parties including Petitioners herein directed to the issue of establishing an alter ego relationship between F.B.S., Inc. and these non-parties.[5]

During this pre-trial period, discovery issues arose between Petitioners and Respondent. Petitioners asked the attorneys for the defendants to represent Petitioners in the discovery disputes. On February 14, 1997, Petitioners substituted out these attorneys and substituted in their own separate attorneys.

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2 formerly known as "Gloria Marshall America, Inc"

3 Subsequently known as F.B.S., Inc.

4 Wife of Mark Bergendahl.

5 Respondent, through the State Attorney General's office, had also pursued discovery from Petitioners for a year before the lawsuit with its administrative subpoena power.

On or about March 6, 1997, Respondent filed a motion for leave to add Petitioners (and others) to the lawsuit as defendants based upon the alter ego doctrine. The motion was denied. The defendants made a motion to exclude all evidence concerning an alleged alter ego relationship between Petitioners (and other non-parties) and Defendant F.B.S., Inc. The court denied the motion to exclude the evidence.

When the trial began on April 7, 1997, the trial court denied Petitioners request to be present and denied Petitioners' attorney's request to participate stating that Petitioners were witnesses and witnesses only and that witnesses were excluded from the courtroom based upon its order excluding all non-party witnesses.

At the conclusion of the trial, Respondent submitted a detailed proposed Statement of Decision and final judgment which not only included the names of the defendants of that action but also Petitioners (and several other non-party defendants) as liable parties. The trial court signed Respondents' version of the Statement of Decision (App. 69)[6] and on February 24, 1998, entered final judgment against the defendants, Petitioners, and other non-parties[7]. (App. 28)

Respondent served Petitioners by mail a Notice of Entry of Judgment on March 3, 1998 (App. 83 - 89). Within the sixty day statutory time period to appeal[8], Petitioners commenced an

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6 This has been provided pursuant to Rule 14(1)(i)(ii) or (vi) although whether the Statement of Decision is relevant to this action is dubious in that the findings of fact made arose out of the evidence presented only by parties other than Petitioners while prohibiting Petitioners to meet the evidence (to which Petitioners contend they clearly are able).

7 Upon their names being written into the final judgment, these non-parties transformed into parties the moment they became liable for the judgment.

8 California Rules of Court Rule 2.

appeal (#B122092).[9] However, Respondent filed a motion to dismiss Petitioners' appeal as untimely. In support of its motion to dismiss, Respondent attached a minute order indicating service on February 24, 1998 (App. 19 - 18), the day the trial court had signed the judgment.[10] The motion to dismiss was granted and the appeal was dismissed as having been untimely filed (App. 18). Petitioners' petition for rehearing to the court of appeal and Petitioners' petition for review to the California Supreme Court were both denied, the last of which occurred on October 21, 1998 (App. 17).

On December 21, 1998, Petitioners filed the complaint below in the Superior Court of California for the County of Los Angeles (#BC202691) seeking to have the judgment set aside for lack of jurisdiction over Petitioners. The trial court sustained Respondent's demurrer and ordered the action dismissed. (App. 13 - 14) The trial court signed an order submitted by Respondent giving the following reasons for the dismissal:

"1. The Complaint fails to state facts sufficient to constitute a cause of action in that the action is barred by an affirmative defense, namely, res judicata.

"2. The Complaint fails to state facts sufficient to constitute a cause of action in that it does not specifically plead that the grounds for relief is either extrinsic fraud or mistake. In light of the record before the court, the Complaint cannot be amended to do so.

"3. The Complaint fails to state facts sufficient to constitute a cause of action in that it does not specifically plead the absence of any remedy at law. In light of the record before the court, the Complaint cannot be amended to

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9 Commenced by filing a Notice of Appeal on May 1, 1998.

10 Notably, although this minute order had been served upon the defendants' trial counsel, but not on any of Petitioners themselves or Petitioners' attorney of record.

do so." (App. 15 - 16)

Petitioners again appealed the decision. The appellate court affirmed the dismissal of their action (App. 3 - 12) and denied their petition for rehearing (App. 2). The California Supreme Court denied Petitioners' petition for discretionary review (App. 1). This Petition follows.

Federal Questions Raised Below

Petitioners asserted that their rights under the Constitution of the United States had been violated in their original complaint filed below in the Superior Court of California for the County of Los Angeles on December 21, 1998 (#BC202691) (App. 73). Petitioners continued to assert their federal constitutional rights in the trial court in their opposition to Respondent's demurrer. (App. 71) On February 8, 1999, the trial court sustained Respondent's demurrer and the entirety of the trial court's order is contained at App. 16 - 17.[11]

On appeal to the Second District Court of Appeal of the State of California (#B130037), these rights were vigorously asserted in their opening and reply briefs. (App. 74 - 75) The opinion of the court of appeal addresses Petitioners' extensive[12] constitutional claims and arguments virtually exclusively in a footnote. (App. 13, fn. 10)

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11 Petitioners did not specifically cite to the trial court Donald E. Nelson v. Adams USA ___ U.S. ___, 120 S.Ct. 1579, 146 L.E.2d 530 (April 25, 2000) because it was not published until two months later.

12 By "extensive," Petitioners mean that of the well over forty pages comprising Petitioners' opening brief, over thirty of them were argument, at least twenty of those pages were focused on Petitioners' federal constitutional rights, citing numerous Supreme Court cases, constitutional provisions, and applying them to the facts of the case.

The Supreme Court of the United States decided Donald E. Nelson v. Adams USA, Inc. on April 25, 2000 just two days before oral argument to the Second District Court of Appeal of the State of California. Petitioners argued the case to the court which stated that they were familiar with it but stated that it did not govern this case stating a short version of what they stated in its opinion which can be found at App. 13.

In their Petition for Rehearing filed after the trial court's order of dismissal was affirmed, Petitioners continued to assert that their rights under the United States Constitution had been violated and specifically addressed the Nelson case (App. 75 - 76) as they continued to do so to the Supreme Court of the State of California in their petition for discretionary review (#S089232). (App. 76)

REASONS FOR GRANTING THE PETITION

I.

IT IS INCONSISTENT WITH FEDERAL DUE PROCESS TO DENY NON-PARTIES THE RIGHT TO BE HEARD REGARDLESS OF HOW SURE THE TRIAL JUDGE IS THAT A CORPORATE DEFENDANT IS THEIR ALTER EGO

The principles that were violated were well-established in American jurisprudence. By refusing Petitioners the right to defend against the allegation that the corporate defendant was Petitioners' "alter ego,"[13] the Court simply swept in a non-party, named the party to the judgment, issued a writ of execution,

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[13] For a history of the doctrine, see Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc. 933 F.2d 131 (2nd Cir. 1991)

and seized the non-parties' property[14], without providing Petitioners any moment to be heard and say, "the corporate defendant is not my alter ego" and "here is my proof." At best, Petitioners were witnesses to a proceeding limited to responding to what the parties asked of them, and in fact, the court refused to permit Petitioners to inject any of what Petitioners wanted to say.

The United States Supreme Court has long held these principles almost sacred. For example, in Scott v. McNeal 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896 (1894), the Court asserted,

> "The words `due process of law,' when applied to judicial proceedings...`mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution - that is, by the law of its creation - to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.' Pennoyer v. Neff, 95 U.S. 714, 733."

id. at 46

> "Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

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[14] To date, through sales of real and personal property, Respondent has ultimately collected most of the judgment from Petitioners and some from the defendants who had been permitted to participate in the trial.

Brinkerhoff-Faris Trust & Savings Co. v. Hill 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107 (1930)

> More recently, the United States Supreme Court stated,
>
> "In disposing of the first issue, there is no occasion to linger long. It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. `Many controversies have raged about the cryptic and abstract words of the Due process Clause but there can be no doubt that at minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Mullane v. Central Hanover Tr. Co., 339 U.S. 306, at 313"

Armstrong v. Manzo 380 U.S. 545, 550, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)

> "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."

Boddie v. Connecticut 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)

> "The essence of due process is the requirement that `a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' Joint Anti-Fascist Comm. v. McGrath, 341 U.S., at 171-172"

Mathews v. Eldridge 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18, (1976)

The fact that Petitioners knew of the proceeding is irrelevant. Petitioners had no right (or obligation) to answer any allegation as none had been filed or served against Petitioners (yet Petitioners tried to appear at trial and were ejected as mere witnesses). No motion was filed as would be the case in all other alter ego cases allowing the proposed new judgment debtor to defend against the allegation that for the purposes of that lawsuit, that the judgment debtor and the corporate defendant should be held to be a single enterprise. Petitioners were just written into the judgment by Respondent and the court accepted it.

> "Nor can extra-official or casual notice...be deemed a substantial substitute for the due process of law that the Constitution requires....`It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court."

Coe v. Armour Fertilizer Works 237 U.S. 413, 424-5, 35 S.Ct. 625, 59 L.Ed. 1027 (1915)

It should take no great moment to see the unconstitutionality of the act of making one liable for a judgment the instant they were made a party and never providing the party any opportunity to defend itself, particularly in the alter ego context where none of Petitioners (or any of the other several companies added) held any ownership, management, or positions of the corporate defendant. Just as was stated in Sniadach v. Family Finance Corp 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969),

> "Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (citation omitted) this...procedure violates the fundamental principles of

due process."

id. at 342

II.

THE CALIFORNIA COURT OF APPEAL ERRED IN NOT FOLLOWING DONALD E. NELSON V. ADAMS USA, INC. (APRIL 25, 2000) WHICH HELD THAT DUE PROCESS AFFORDS EVERY PARTY THE OPPORTUNITY TO DEFEND REGARDLESS OF JUDICIAL PREDICTIONS OF THE OUTCOME OF THE PROCESS

Two days prior to oral argument at the Second District Court of Appeal of the State of California, a unanimous Supreme Court of the United States decided the case of Donald E. Nelson v. Adams USA, Inc. (April 25, 2000) ___ U.S.___, 120 S.Ct. 1579, 146 L.Ed.2d 530.

In Nelson, the Court rejected the idea that a trial court's perception that a litigant has no case to present is relevant as to whether the litigant has the right to legal notice and to a meaningful opportunity to be heard. Just like in the trial court below and the Second District Court of Appeal's opinion filed in the case below on May 9, 2000, the lower court in Nelson had misguidedly stated,

> "Instead, the Federal Circuit reasoned that nothing much turned on whether the party opposing Adams' claim for costs and fees was OCP or Nelson. `[N]o basis has been advanced...to believe anything different or additional would have been done to defend against the allegation of inequitable conduct had Nelson individually already been added as a party or had he been a party from the outset.' 175 F.3d, at 1351."

Nelson, supra. 120 S.Ct. at 1587

The superior court (in the original action) said the same thing in its Statement of Decision:

> "Had the alter egos been allowed to participate directly, the alter egos could not have produced any evidence that would have affected the outcome of the trial." (App. 62)

The Nelson opinion states,

> "We neither dispute nor endorse the substance of this speculation. We say instead that judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated."

Nelson, supra. 120 S.Ct.at 1587

The Second District Court of Appeal below also relied upon factual findings found after a trial to which Petitioners were not parties and were not provided the opportunity to meet the evidence produced by the parties in that action stating,

> "In its statement of decision, the superior court provided a lengthy discussion of the alter ego issue and the three `key' factors. That discussion is so detailed that we find it difficult to even to summarize." (App. 9)

In Coe v. Armour Fertilizer Works 237 U.S. 413, 35 S.Ct. 625, 59 L.Ed. 1027 (1915), the United States Supreme Court stated, "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. id. at 424

The Second District Court of Appeal was not only told about Nelson at the oral hearing, but in a Petition for Rehearing. (App. 75 - 76) Yet, in its opinion, affirming the lower court, the only mention to Nelson provided was a footnote ("Thus, the present case is distinguishable from *Nelson v. Adams USA, Inc.* (April 25, 2000) ___ U.S. ___ [2000 WL 459282].") The Second District distinguished this case from Nelson by stating that Petitioners "received adequate notice and an opportunity to be heard on the alter ego issue." (App. 13)

The Second District Court of Appeal was correct on the point that the issue was about whether adequate notice and opportunity to be heard on the alter ego issue was afforded Petitioner, but on what basis did it state that Petitioners had in fact been afforded adequate notice and opportunity to be heard and thereby distinguish Nelson? The alleged factual basis of this distinguishing is as follows:

1. Gloria Sarno was called as a witness by both Respondent and the original defendants

2. There were discovery disputes between Gloria Sarno, as a witness, and Respondent before the trial.

3. The Sarno parties were allowed to present evidence at trial on the alter ego issue.

(App. 10 - 13)

Starting with the last of these bases first, were that true, this Petition would not be here today, for the fact is that this is simply not true. What the Second District Court of Appeal appears to be saying is that because Mrs. Sarno was called as a witness by the parties of that lawsuit (#1 above), the "Sarno parties" were allowed to present evidence in their own defense which has already been discussed and is obvious, is not adequate opportunity to be heard. The only other possible

explanation is that the Second District Court of Appeal is mistaken and did not understand that Petitioners were never allowed to present any of their evidence at the trial and were completely restricted to answer the questions posed to them by Respondent's attorneys and the original defendants' attorneys.[15] But the fact of the matter remains that mistaken or not, being simply a non-party witness to a matter does not provide one a meaningful opportunity to defend.

As witnesses, one has no right or obligation to defend themselves. "It is settled that one who is not a party to a proceeding may not make a motion therein...It is a recognized rule of legal procedure that no one not a party to the action, without any disclosed interest in the result thereof, can be permitted to thrust himself into the controversy by filing any character of pleading therein...." Lavaysse v. Superior Court (1944) 63 Cal.App.2d 223, 225 Coe. supra. 237 U.S. at 424 ("The fallacy of this is that it ignores the issue of law raised by the petition...and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate.")

But Petitioners *did* try to be heard - at every step of the way - but the court refused their requests to produce evidence at the trial and to have their own attorney examine witnesses and produce argument. Upon discovery that the final judgment was not only in favor of Respondent, but that Respondent was not going to be filing a motion to add Petitioners as defendants as they simply somehow got their names written into the judgment, Petitioners appealed, but, as already stated, untimely and the appeal was dismissed ultimately causing the lower action to be filed.

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15 It bears repeating that Petitioners were added not as the result of any motion or application being filed, but simply by the judicial officer writing their names into the judgment with no opportunity to be heard afforded Petitioners either before or after doing so.

In fact, just as in Nelson, Respondent could have provided Petitioners with legal notice of the action prior to trial with a summons and complaint and an opportunity to be heard and to participate in the trial rather than have their hands tied behind their back, but it chose not to for three years prior to trial - for curious reasons known only to itself.

Respondent could have named Petitioners in the original complaint when they had already been serving administrative subpoenas upon Petitioners at the issue of alter ego but they did not and this left Petitioners with no remedy but wait for an anticipated motion or amended pleading which never ever came (except the motion to add them as parties which was even denied). Yet, at the conclusion of the trial, without having transformed Petitioners from mere witnesses to parties, the Court named Petitioners in the Judgment and at the exact moment they were written into the Judgment, they were found "guilty" as charged. In Nelson, the Supreme Court referenced a very similar situation (actually a situation less egregious because in Nelson, a motion to add had been filed, but the problem was that after being added, the added party had to be given an opportunity to be heard *as a party*, and the fact that a concurrent motion had been filed to also bind them to a liability was not relevant since until added as a party, they had no cause to respond to the motion). The Supreme Court stated,

> "Respondent Adams made no...mistake [concerning the identity of the proper party]. It knew of Nelson's role and existence and, until it moved to amend its pleading, chose to assert its claim for costs and fees only against OCP."

Nelson supra. 120 S.Ct. at 1585

Respondent not only knew of the existence of Petitioners, Respondent was prepared on the first day of trial to put on a two month trial concerning Petitioners in their absence and when they were not parties to the action. In fact, it was not

until after the entry of the final judgment, that Respondent sent a Notice of Entry of Judgment to Petitioners believing that by that point it was time to respect some of their rights.

III.

THE RIGHT TO BE HEARD EMPHASIZED IN DONALD E. NELSON V. ADAMS USA, INC. (APRIL 25, 2000) SHOULD APPLY EVEN WHERE THE NON-PARTY IS HELD LIABLE BASED UPON THE DOCTRINE OF ALTER EGO

In Viking Industrial Security, Inc. v. National Labor Relations Board 225 F.3d 131, 136, 2000 WL 1218799 (2nd cir. 2000), the court stated,

> "In this case, our holding is no procedural technicality. The principals of the two companies were at odds. The only named respondent was headed for insolvency and arguably lacked incentive to mount a strenuous or expensive defense to the unfair labor practice charge."

The Viking opinion proceeds to cite Nelson, supra as stating, "[D]ue process...demand[s] a more reliable and orderly course.").

Some lower courts have already addressed this issue:

> "Without proof of the alter ego relationship, we cannot assume that the nominal owners have received their day in court nor that they can be expected to know that plaintiff will attempt to execute on their property. The constitutional rights of the Dumrong companies cannot be eliminated from the balance simply because Strick alleges they are alter egos of the judgment debtors....¶... Because the attached property is nominally owned by the Dumrong companies, we must also consider their interests....¶...Prior to the deprivation, no requirement of

> notice, hearing or other safeguard existed to protect the Dumrong companies from inaccurate conclusory allegations."

Strick Corporation v. Thai Teak Products Company, Ltd. 493 F.Supp. 1210 (E.D. Penn. 1980)

Petitioners do not seek to have Respondent have to reprove its case against the original defendants nor to have Respondent prove it against Petitioners. Petitioners contend, however, that Petitioners have a federal constitutional right to dispute whether Petitioners should be held liable for the debts of another company. Whether based upon alter ego, assignment, licensee, respondeat superior, or any one of a number of other legal bases for holding one liable for the acts of another, Petitioners had the right to deny it was in the alleged relationship and be heard on its denial.

This is not a case where the alter ego relationship remains undisputed such as in D.H. Overmyer Telecasting Co. v. Hadar Leasing International Co., Inc. 53 B.R. 963 (N.D., Ohio, E.D. 1984),

> "The intervenors contention that procedural due process requires that they receive a summons and be afforded the opportunity to actively participate in the trial proceedings is not well taken. As to the issues in these proceedings, the due process rights of the intervenors have been satisfied because a party whose interests are identical to theirs represented the intervenors in the trial court proceedings....Since Mr. Overmyer received the required due process procedures, the intervenors, who do not dispute being his alter ego, have also been afforded the required constitutional protections...."

Petitioners do dispute that they are in an alter ego relationship with F.B.S., Inc. and have always wanted to be heard in their own defense. It is this that constitutionally

Petitioners have the right to say and defend yet to this date have been prohibited from doing so and to a shockingly routine manner.

To the extent that Nelson did not directly govern a situation that includes such a situation, it should. In the criminal context, one is innocent until proven guilty and in American jurisprudence, Petitioners are entitled to their day in court before having $400,000 taken from them (as has already almost completely been done). Nelson should be extended to apply to protect persons alleged to be in an alter ego relationship with corporate defendants.

IV.

CALIFORNIA'S CODE OF CIVIL PROCEDURE §187 IS UNCONSTITUTIONAL TO THE EXTENT THAT IT IS APPLIED TO PERMIT THE ENTRY OF A JUDGMENT AGAINST SOMEONE THE INSTANT THE PERSON IS MADE A PARTY TO THE PROCEEDING AND DEPRIVES THEM OF ANY POST-JUDGMENT PROCESS TO CONTEST THE ENTRY OF THE JUDGMENT AGAINST THEM

Petitioners are not contesting the doctrine of alter ego itself, or the right in appropriate cases to bind non-parties to judgments following an orderly process that respects the due process rights of the non-parties, or, even the application of a state's statute that allows for this to occur within the boundaries of the Due Process Clause. Yet, the application of a state statute, such as California Code of Civil Procedure §187 (App 72) to bind a non-party to a judgment without providing the non-party any right to defend itself against the allegation that there is a sufficiently close relationship between it and the corporate defendant to hold the non-party to the already adjudicated findings, is being contested.

This case is one step removed from other cases where persons that were not named in a judgment had their property taken without notice or opportunity to be heard such as National Stabilization Agreement of the Sheet Metal Industry Trust Fund 71 F. Supp.2d 427 (M.D., Penn 1999), where it was stated,

> "While the Strickland and ABC cases involved allegations that one entity was actually the `alter ego' of another, we find their reasoning equally applicable to the present situation....Regardless, the situation is the same as in Strickland and ABC; an entity who was not the named judgment debtor had its property attached with no notice or hearing."

In the instant case, Petitioners were named as a judgment debtor but this is hardly a significant distinction. It does not take any significant energy to physically write the names of people and companies into a judgment. The significance between those named and those not named would only exist in the situation where those named were named consistent with the Due Process Clause, to wit, after they had received legal notice of allegations against them and a meaningful opportunity to speak in their own defense prior to entry of judgment (or, even after in some cases, as Petitioners were denied both).

V.

NONE OF THE REASONS PROVIDED BY THE TRIAL COURT FOR SUSTAINING RESPONDENT'S DEMURRER ARE CONSTITUTIONALLY PROPER

The court's acceptance of Respondent's argument that Petitioners were barred based upon the doctrine of res judicata is not clear, at best, and absurd at worst. What was being argued was simply never clear. It seems that Respondent may have been arguing that the issue of jurisdiction of the trial court

over Petitioners has already been decided by the court because, "[i]n order to find that the alter-ego defendants were subject to the jurisdiction, the court had to find that it exercised jurisdiction over them." Yet Petitioners were not a part of this implied adjudication and adjudication is a core element of the doctrine of res judicata. Moreover, this is obviously grossly circular.

Respondent appeared to also be arguing that because the court ruled that Petitioners were "one and the same" as F.B.S., Inc., and F.B.S., Inc. had a "vigorous" adjudication of the issues, the doctrine of res judicata barred Petitioners' action below. This is also circular – Petitioners are not related to F.B.S., Inc. and Petitioners have never been shown to be accept in a trial wherein Petitioners were literally ordered to stay out of the trial.

The only other discernable basis of Respondent's argument may be that Petitioners were barred because Petitioners "clearly had a right to appeal from the judgment against them[,]" "neither [Respondent] nor the trial court in anyway prevented them from filing a Notice of Appeal[,] and the "dismissal by the Court of Appeal of their Notice of Appeal was attributable to their filing of an untimely notice." Most fundamentally, this shotgun res judicata argument is faulty at its core. For example, in a California state case, the issue was directly addressed. In Rochin v. Pat Johnson Manufacturing Co. 67 Cal.App.4th 1228 (1998), similar arguments were made and rejected by the appellate court,

> "Defendants contended below and the trial court agreed in sustaining plaintiff's demurrer that the present action is barred by the doctrine of res judicata. Specifically, defendants assert that plaintiff's failure to file a cross-appeal from the amended judgment resulted in the amended judgment becoming final and having preclusive effect...We disagree.
>
> "The doctrine of res judicata is inapplicable to void

judgments....

> "...Plaintiff's failure to file a cross-appeal from the amended judgment, thus in a sense allowing it to become final, plainly does not give the amended judgment preclusive effect. The amended judgment is a nullity, and can have no such effect....
>
> "...We conclude that the trial court erred in sustaining defendants' demurrer on the basis of res judicata."

id. at 109

Thus, the "issue" remains, whether the judgment in the prior proceeding is void as to Petitioners as the complaint alleged, but concerning which Petitioners have been prevented from being heard. Not even the dismissal of an appeal as untimely has any preclusive effect,

> "The following are typical dismissals which are not on the merits and consequently not res judicata.
>
> "(a) Dismissal for lack of jurisdiction. (See GMS Properties v. Superior Court (1963) 219 Cal.App.2d 407, 415, 33 Cal.Rptr. 163; Nichols v. Canoga Industries (1978) 83 Cal.App.3d 956, 967, 148 Cal.Rptr. 459, citing the test;..."

7 Witkin, California Procedure, Judgment, §226, p. 663

The reason Petitioners' appeal was dismissed was because after they found out about the judgment and they tried to commence an appeal, it was untimely (as already discussed). An untimely filed Notice of Appeal does not confer any jurisdiction to the appellate court and the appeal must be dismissed. Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc. 15 Cal.4th 51, 56, 61

Cal.Rptr. 2d 166, 168 (1997)[16]

Moreover, the argument that because the court exercised jurisdiction it necessarily found it had jurisdiction and thus the matter of jurisdiction has already been decided is patently circular. Perhaps the nomenclature of the alter ego area of the law adds to the confusion. When a party is held liable for the debts of another pursuant to the alter ego doctrine, words and phrases such as "one and the same," "single enterprise," and "alter ego" are normally used. However, neither factually, nor legally, are the parties really considered one and the same. For example, in Mesler v. Bragg Management Co. 39 Cal.3d 290 (1985), the California Supreme Court stated,

> "However, and this is where the court in Fuls went astray when a court disregards the corporate entity, it does not dissolve the corporation. `it is often said that the court will disregard the `fiction' of the corporate entity, or will `pierce the corporate veil.' Some writers have criticized this statement, contending that the corporate entity is not a fiction, and that the doctrine merely limits the exercise of the corporate privilege to prevent its abuse.' (6 Witkin, op. cit. supra. §5 at p. 4317....)"

id. at 300

The court continued,

> "Rather, it is that under certain circumstances, a hole will be drilled in the wall of limited liability erected by the corporate form; for all purposes other than that for which the hole was drilled, the wall still stands. When it is claimed that a parent corporation should be liable

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[16] To be clear, even the notices of entry of a void judgment are "equally void, ineffectual for any purpose and meaningless." People v. Cox 202 Cal.App.3d 574, 580 (1988)

> because it is the alter ego of its subsidiary, equity commands that the corporate wall be breached. Yet the wall remains: the parent is liable through the acts of the subsidiary, but as a separate entity."

id. at 301

In fact, it might be noted, that a properly noticed and served post-judgment motion pursuant to California's Code of Civil Procedure §187 was the opportunity for Respondent to bind Petitioners if Respondent prevailed (and visa versa). In that instance alone would the doctrine of res judicata apply.

The other reasons given by the trial court in sustaining Respondent's demurrers are even more curious. There is no issue of extrinsic fraud or mistake. Petitioner's only "mistake" was not being superhuman and able to communicate to the court despite being locked out of the courtroom as "mere witnesses." The allegation that the court wrote in Petitioners' name to a judgment contrary to the constitution does not have any requirement of an allegation of "extrinsic fraud or mistake."

Likewise, as stated above, a void judgment may be collaterally attacked at anytime, whether by separate action or awaiting some type of enforcement action. Petitioners at all times tried to be heard yet nobody would permit them. They even tried to exercise a remedy at law, to wit an appeal, but since they were not provided with any notice of the Clerk's February 24, 1998 minute order (until Respondent moved to dismiss their appeal as untimely), Petitioners did not get an appeal timely filed.

CONCLUSION

The Second District Court of Appeal for the State of California clearly reached a result inconsistent with Due Process as Americans know and treasure it, improperly refused to follow the unanimous Supreme Court in Nelson, and

improperly permitted California's broad powers statute to be applied to deprive a person of its property without an opportunity to be heard.

It is absolutely clear that Petitioners were denied fundamental due process rights. It is also clear that unless the Supreme Court of the United States grants this application to review the matter, more people like Petitioners will have their property taken from them by the government. As far back as the Mayflower Compact of 1620 and the Declaration of Independence of 1776, this land determined that it would be a land of law, not of men, and that the constitution of this land would be paramount.

Respectfully submitted,

OFFICE OF ROBERT SAINBURG,
Attorneys

Dated: 10-7-10

By: _____
ROBERT SAINBURG
Counsel for Petitioners
GLORIA SARNO, G.M.F.C., INC.,
and GLORIA MARSHALL
SALON OF TORRANCE

Supreme Court, U.S.
FILED

NO. 00-7130CT 24 2000

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

GLORIA SARNO, G.M.F.C., INC.,
GLORIA MARSHALL SALON OF TORRANCE,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ of Certiorari
To The Second District Court Of Appeal
Of The State Of California

APPENDICES TO PETITION FOR WRIT OF CERTIORARI
(Volume I, App. 1 - 45)

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Court of Appeal, Second Appellate District, Division One - No. B130037
S089232

IN THE SUPREME COURT OF CALIFORNIA

En Banc

GLORIA SARNO, et al., Appellants,

v.

STATE OF CALIFORNIA, et al., Respondents.

Petition for review DENIED.

SUPREME COURT
FILED
JUL 26 2000
Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION: 1

DATE: May 26, 2000

Richard E. Eldred
700 N. Central Avenue
Suite 240
Glendale, CA 91203-1240

Gloria Sarno, et al.
v.
State of California

B130037
Los Angeles County No. BC202691

THE COURT:

Petition for rehearing is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

GLORIA SARNO et al.,	) B130037
	)
Plaintiffs and Appellants	) (Los Angeles County
	) Super. Ct. No. BC 202691)
v.	)
	) COURT OF APPEAL
STATE OF CALIFORNIA, et. al.	) SECOND DISTRICT
	) FILED May 9, 2000
Defendants and Respondents	) Joseph A. Lane, Clerk
_____	)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard P. Kalustian, Judge. Affirmed.

Law Offices of Richard E. Eldred and Richard E. Eldred for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Herschel T. Elkins, Senior Assistant Attorney General, Jerry Smilowitz, Deputy Attorney General; Gil Garcetti, Deputy Attorney (Los Angeles), Thomas A. Papageorge, Heady Deputy District Attorney, and Dana Aratani, Deputy District Attorney, for Defendants and Respondents.

In a prior action, plaintiffs were found to be judgment debtors on the theory that they were alter egos of the named defendants. Plaintiffs appealed the judgment, but the appeal was dismissed as untimely. Plaintiffs then brought this action to set aside the judgment. The trial court dismissed the action on demurrer. We affirm.

BACKGROUND

On February 14, 1995, the People of the State of California (the "State") filed an action against Gloria Marshall America, Inc., a weight reduction salon for women (*State of California v. Gloria Marshall America, Inc.* (Super. Ct. L.A. County, 1995, No. BC121888)). Also sued were the company's officers and owners, Mark and Kellee Bergendahl. The complaint alleged that the defendants had engaged in deceptive advertising and unfair competition. On September 14, 1995, the State filed a first amended complaint, adding FBS, Inc. – the new name of Gloria Marshall America, Inc. – as a defendant.

For the next two years, the State engaged in discovery directed at proving that Gloria Sarno (nee Gloria Marshall) and several of her companies were the alter egos of the named defendants (FBS, Inc. and the Bergendahls).[1] For example, the State subpoenaed documents from G.M.F.C., Inc. and Gloria Marshall Salon of Torrance, two nonparty businesses owned by Sarno. The State also served Sarno with a deposition subpoena. Sarno and the non-party companies refused to comply with the subpoenas. The State successfully moved to compel discovery and was awarded $6,700 in sanctions.

During the discovery phase, Scott Fraser, Esq. of Nelson & Nelson, represented the named defendants as well as Sarno and her nonparty businesses. Fraser clearly understood that the State was pursuing an alter ego theory of liability as to Sarno and her companies. By way of example, in a letter to the State dated October 17, 1996, Fraser commented: "With respect to the single enterprise theory, [the State] would have to prove that the other Gloria Marshall entities benefitted from the monies taken in by [FBS, Inc.], made capital contributions to fund the operation of the salons, and treated [FBS, Inc.] as their own. [FBS, Inc.] did in fact receive favorable business treatment from Gloria Sarno and some of her businesses because of the familial

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[1] Defendant Mark Bergendahl is Gloria Sarno's son.

relationship, i.e., GMFC agreed to extend the dates for repayment of loans, but Mrs. Sarno and her businesses did not transact business with [FBS, Inc.] with the intent to run [it] or to influence its operations."[2]

On or about March 6, 1997, one month before trial, the State moved for leave to amend the complaint to add Sarno and her nonparty businesses as defendants. The superior court denied the motion.[3] For their part, defendants moved in limine to exclude evidence regarding the possible existence of alter egos. That motion, too, was denied. On April 7, 1997, the case was tried to the court. At the beginning of trial, the court ruled that the parties could offer evidence concerning alter egos.

The trial lasted more than two months, ending on June 20, 1997. On August 29, 1997, the superior court issued a "Statement of Intended Decision." In response, the State filed a "corrected/proposed" statement of decision. Defendants filed objections. On October 30, 1997, the superior court filed its "Statement of Decision,' consisting of 32 pages, 25 of which were devoted to the alter ego issue. The court concluded that Sarno and her nonparty businesses were the alter egos of the named defendants.[4]

On February 24, 1998, the superior court entered judgment in accordance with the statement of decision. On the

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2 Fraser also represented the named defendants at trial.

3 To avoid confusion, we use "superior court" in referring to the earlier action and "trial court" in referring to the present action.

4 The list of alter egos was as follows: (1) Gloria Sarno (aka Gloria Marshall, Gloria Bergendahl); (2) G.M.F.C., Inc.; (3) Gloria Marshall Salon of Torrance; (4) Redfield Taylor Associates, Inc.; (5) Gloria Marshall of Utah, Inc.; (6) Gloria Marshall International, Inc.; (7) Gloria Marshall Figure Salons of Australia Pty. Ltd.; (8) G.M.F.C. (Aust.) Pty. Ltd.; and (9) International Health Industries Ohio, Inc.

same day, the clerk of the court mailed to counsel a notice of entry of judgment.[5] On May 1, 1998, the alter ego parties, including Sarno, appealed from the judgment. The State moved to dismiss the appeals as untimely. Opposition was filed. On July 8, 1998, we granted the motion to dismiss (B122092). We later denied a petition for rehearing. On October 21, 1998, the California Supreme Court denied a petition for review (S072677).

On December 21, 1998, Sarno and four of her companies (collectively the "Sarno parties") brought this action to set aside the judgment.[6] On January 11, 1999, a first amended complaint was filed, naming as defendants the State, the People of the State of California, the County of Los Angeles, and the Los Angeles County Sheriff's Department (collectively the "State"). The Sarno parties alleged that the prior judgment was void under the state and federal due process clauses (Cal. Const., art. I §7, subd. (a); U.S. Const., Amend. XIV) because the superior court lacked personal jurisdiction over them. In that regard, they further alleged that, in the earlier action, they were not served with summons, given an opportunity to be heard, permitted to have counsel to defend their interests, or allowed to be present during the trial.

On January 13, 1999, the State filed a demurrer, asserting that the action was barred by, among other things, the doctrine of res judicata. The State also contended that the action constituted an improper collateral attack on the prior judgment inasmuch as the complaint failed to seek relief on the grounds of extrinsic fraud or mistake. Opposition was filed. By order dated February 1, 1999, the trial court sustained the demurrer

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5 Attorney Fraser claims that he did not receive the notice.

6 The four businesses were among the entities named in the superior court's statement of decision and the judgment, to wit: G.M.F.C., Inc.; Gloria Marshall Salon of Torrance; Gloria Marshall Salons of Australia Pty. Ltd.; and G.M.F.C. (Aust.) Pty. Ltd. (See fn. 4, *ante*.)

without leave to amend. On March 2, 1999, the action was dismissed with prejudice. A timely appeal followed.

DISCUSSION

Code of Civil Procedure section 187 provides: "When jurisdiction is, by the Constitution, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

"A trial court has the authority to amend a judgment in order to add additional judgment debtors. Code of Civil Procedure section 187 has often served as the basis for such an amendment of a judgment, pursuant to the alter ego doctrine....And, the general rule is that `a court may amend its judgment at any time so that the judgment will properly designate the real defendants.'" (*Dow Jones Co. v. Avenel* (1984) 151 Cal.App.3d 144, 148-149, citations omitted.)

"Judgments are often amended to add additional judgment debtors on the grounds that a person or entity is the alter ego of the original judgment debtor....This is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant....`Such a procedure is an appropriate and complete method by which to bind new individual defendants where it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit.'...In other words, `[i]f the claim of individual liability is made at some later stage in the action, the judgment can be made individually binding on a person associated with the corporation only if the individual to be charged, personally or through a representative, had control of

the litigation and occasion to conduct it with a diligence corresponding to the risk of personal liability that was involved.'" (*NEC Electronics, Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778, citations omitted.)

In the prior action, the superior court stated: "[T]hree key factors – control of the litigation, a vigorous defense, and a similarity of interests between the named defendants and the alter ego – overlap each other. Applying them to the present case strongly tips the balance for allowing an amendment of the judgment against the named defendants to include as alter egos [the Sarno parties]."[7]

In its statement of decision, the superior court provided a lengthy discussion of the alter ego issue and the three "key" factors. That discussion is so detailed that we find it difficult even to summarize. Nevertheless, suffice it to say that evidence concerning the (1) payment of legal fees, (2) use of joint counsel (Nelson & Nelson), and (3) trial strategy established that the Sarno parties had the requisite control of the litigation. As to the nature of the defense, the "the named defendants...fully litigated [the] issues relating to both liability and alter ego." (Underscoring in original.)

Finally, with respect to the similarity of interests between the named defendants and the Sarno parties, the trial court stated: "What makes this trial distinguishable from virtually every reported decision on amending judgments to include alter egos is that both counsel were allowed by the court to present evidence at trial on not just liability, but alter ego issues as well. Mrs. Sarno, for instance, was called as a witness by both sides. Had the alter egos been allowed to participate directly, the alter egos could not have produced any evidence that would have affected the outcome of the trial. Certainly,

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[7] Technically speaking, the trial court did not "amend" the judgment. The Sarno parties were named as judgment debtors in the original (and only) judgment.

through the person of Mrs. Sarno, as examined by her long-time counsel, she had the opportunity to do so."

On appeal, the Sarno parties assert that they did not receive adequate notice or a meaningful opportunity to be heard on the alter ego issue. That assertion borders on the absurd. During two years of discovery, the State gathered evidence on the existence and identity of alter egos. In response, the named defendants and the Sarno parties – all represented by the same attorney (Fraser) – attempted unsuccessfully to block the discovery.[8]

Further, in an October 1996 letter – more than five months before trial – Fraser acknowledged that "[w]ith respect to the single enterprise theory, [the State] would have to prove that the *other Gloria Marshall entities* benefitted from the monies taken in by [FBS, Inc.]...." (Italics added) Plainly, Fraser knew which entities were at the center of the dispute. Indeed, before trial, he brought an in limine motion to preclude "evidence concerning alleged `alter ego' relationships between defendants FBS, Inc., Mark Bergendahl and Kellee Bergendahl...[and] *nine separate non-party* individuals and corporations...." (Italics added.) And, like the State, the Sarno parties were allowed to present evidence at trial on the alter ego issue.[9]

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8 As the superior court observed: "[The State] had sought throughout the course of its discovery efforts to uncover sufficient evidence to name Mrs. Sarno and her enterprises as alter egos. When Mark Bergendahl, Kellee Bergendahl, and Gloria Sarno all failed to show up for their individually scheduled depositions at the end of 1996, [the State] immediately sought an order from this court to compel their attendance."

9 The Sarno parties repeatedly claim that the State never filed a motion to add them to the complaint. Yet, they acknowledge in their opening brief that such a motion was filed on or about March 6, 1997. Also, the Sarno parties point out that they were not added as judgment debtors

The present case is strikingly similar to *Mirabito v. San Francisco Dairy Co.* (1935) 8 Cal.App.2d 54. There, a jury returned a verdict against San Francisco Dairy Company, and the plaintiff successfully moved to add "Dairy Delivery Company, Inc." as a judgment debtor. Dairy Delivery Company appealed, and the Court of Appeal affirmed, stating:

"Appellant herein contends that the order...whereby [it was] added to the judgment, is in excess of the superior court's jurisdiction; that it is void for want of jurisdiction of said court over the appellant herein; that said order and the refusal of the superior court to set the same aside was a denial of due process of law to appellant and violative of the Fourteenth Amendment to the Constitution of the United States; and that the addition of the words `Dairy Delivery Company, Inc., a corporation' to the judgment is not in conformity with the verdict nor supported by the pleadings or issues. [The plaintiff], on the other hand, contends that by virtue of the inherent authority of a court to make its records speak the truth, the superior court had jurisdiction to amend the judgment because the evidence herein clearly showed....that `...San Francisco Dairy Company was merely the *alter ego* of the Dairy Delivery Company'; hence that the amendment did not add a new defendant to the judgment, but merely set forth the correct name of the real defendant.

"....

"...The rule has long been declared in California that where the facts warrant, courts may amend pleadings to correctly designate the parties actually involved....The basis of the rule is, of course, that the court having acquired jurisdiction of the person of the defendant and of the subject of the action, it necessarily possessed the power to correct a misnomer....Where,...as here,...the evidence is sufficient to

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*post*judgment but were included in the original judgment. We find that distinction to be of no significance.

warrant the conclusion that in effect the two corporations are identical; where, as here, the action was fully and fairly tried with at least the direct financial assistance of appellant; and where, as here, nothing appears in the record to show that Dairy Delivery Company could have produced a scintilla of evidence that would have in any way affected the results of the trial, there is no basis for a different rule. The trial court having acquired jurisdiction of San Francisco Dairy Company must likewise be held to have acquired jurisdiction of its alter ego, the appellant herein. To hold otherwise upon the facts herein would be to deny [the plaintiff] the fruits of fairly contested litigation, place a premium upon acts and conduct which have misled a litigant, and frustrate the very purpose of our jurisprudence." (8 Cal.App.2d at pp. 57-60, quoted with approval in *Ukegawa Brothers v. Agricultural Labor Relations Bd.* (1989) 212 Cal.App.3d 1314, 1323-1324)

Moreover, by including the Sarno parties in the judgment, the superior court necessarily found that it had personal jurisdiction over them. (See Code Civ. Proc., §187.) That conclusion was based on evidence regarding alter egos which the trial court permitted the parties to introduce. It follows that the issue of personal jurisdiction was adjudicated in favor of the State. Having failed to challenge that determination in the earlier action, the Sarno parties are precluded from doing so now. As Witkin explains:

"Suppose a final decision on jurisdiction has been made by a decision of the lower tribunal in favor of its jurisdiction, and the objecting party either has failed to seek a review of the determination by motion or appeal or otherwise, or has had such a review and the reviewing court has upheld the determination. If the matter involved is jurisdiction of the person, when the determination becomes final it may be res judicata and no longer subject to attack, even though demonstrably wrong. The same reasons for application of the doctrine of res judicata apply here as in cases involving final determinations of substantive rights and liabilities. And, since

jurisdiction of the person can be conferred by mere consent on a court which otherwise have no such jurisdiction, it is not too great an additional step to hold that a party who litigates the question may be bound by the final determination of the court." (2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 335, p. 922, italics added, original italics omitted.)

In sum, we conclude that the Sarno parties received adequate notice and an opportunity to be heard on the alter ego issue.[10] Moreover, assuming that the superior court erred in finding that it had jurisdiction over the Sarno parties, they should have challenged that determination by way of appeal, not by making a collateral attack in a subsequent action.

DISPOSITION

The order of dismissal is affirmed

NOT TO BE PUBLISHED.

MASTERSON, J.

We concur:

SPENCER, P.J.
ORTEGA, J.

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10 Thus, the present case is distinguishable from *Nelson v Adams USA, Inc.* (Apr. 25, 2000, No. 99-502) ___ U.S. ___ [2000 WL 459282].

FILED
LOS ANGELES SUPERIOR COURT
MAR 2, 1999
JOHN A. CLARKE, CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

GLORIA SARNO aka Gloria Marshall, aka Gloria Bergendahl, an individual; G.M.F.C., a California corporation; GLORIA MARSHALL SALON OF TORRANCE, a California general partnership; GLORIA MARSHALL FIGURE SALONS OF AUSTRALIA PTY. LTD., an Australian corporation; and G.M.F.C. (Aust.) PTY. LTD., an Australian Corporation, Plaintiffs, STATE OF CALIFORNIA, a public entity; COUNTY OF LOS ANGELES, a public entity; PEOPLE OF THE STATE OF CALIFORNIA; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; and DOES 1 through 5, inclusive, Defendants.	CASE NO. BC 202 691 ORDER DISMISSING ACTION WITH PREJUDICE Hon. Richard Kalustian Dept: 17 Date: January 29, 1999 Time: 8:45 a.m. Date Action Filed: 12/21/98 Trial Date: None Set

This Court, having issued an Order Sustaining Demurrer Without Leave to Amend on February 8, 1999, IT IS HEREBY

ORDERED:

The above-captioned action is dismissed with prejudice.

Dated: 3/2/99

(signature)

_____

JUDGE OF THE SUPERIOR COURT

FILED FEBRUARY 8, 1999

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

GLORIA SARNO aka Gloria Marshall, aka Gloria Bergendahl, an individual; G.M.F.C., a California corporation; GLORIA MARSHALL SALON OF TORRANCE, a California general partnership; GLORIA MARSHALL FIGURE SALONS OF AUSTRALIA PTY. LTD., an Australian corporation; and G.M.F.C. (Aust.) PTY. LTD., an Australian Corporation, Plaintiffs, STATE OF CALIFORNIA, a public entity; COUNTY OF LOS ANGELES, a public entity; PEOPLE OF THE STATE OF CALIFORNIA; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; and DOES 1 through 5, inclusive, Defendants.	CASE NO. BC 202 691 ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND Hon. Richard Kalustian Dept: 17 Date: January 29, 1999 Time: 8:45 a.m. Date Action Filed: 12/21/98 Trial Date: None Set

The demurrer of Defendant, the People of the State of California, to the First Amended Complaint on file herein came on regularly for hearing before the undersigned on January 29,

1999, upon notice duly and regularly served, Plaintiffs, Gloria Sarno, G.M.F.C., Gloria Marshall Salon of Torrance, Gloria Marshall Figure Salons of Australia Pty. Ltd., and G.M.F.C. (Aust.) Pty. Ltd., appearing by their attorney, Richard E. Eldred, and Defendant, the People of the State of California, appearing by its attorneys, Jerry Smilowitz, Deputy Attorney General, and Dana Aratani, Deputy District Attorney of Los Angeles County, and the matter having been presented, argued and submitted and good cause appearing therefor,

IT IS HEREBY ORDERED THAT the demurrer to the Complaint be and the same is hereby sustained without leave to amend on the following grounds:

1. The Complaint fails to state facts sufficient to constitute a cause of action in that the action is barred by an affirmative defense, namely, res judicata.

2. The Complaint fails to state facts sufficient to constitute a cause of action in that it does not specifically plead that the grounds for relief is either extrinsic fraud or mistake. In light of the record before the court, the Complaint cannot be amended to do so.

3. The Complaint fails to state facts sufficient to constitute a cause of action in that it does not specifically plead the absence of any remedy at law. In light of the record before the court, the Complaint cannot be amended to do so.

Dated: 2/8/99

/s/

JUDGE OF THE SUPERIOR COURT

Second Appellate District, Division One - No. B122092
S072677

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

GLORIA MARSHALL AMERICA INCORPORATED, et al.,
Appellants

Appellant's petition for review DENIED.

SUPREME COURT
FILED
OCT 21 1998

_____
Deputy

GEORGE
_____
Chief Justice

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent v. GLORIA MARSHALL AMERICA, INC.; FBS, INC.; MARK BERGENDAHL; KELLEE BERGENDAHL, Defendants and Appellants	No. B122092 (Super. Ct. No. BC121888) Los Angeles County ORDER COURT OF APPEAL - SECOND DISTRICT FILED July 8, 1998 JOSEPH A. LANE Clerk C. Hon Deputy Clerk

Respondent's motions to dismiss are granted.

The notices of appeals filed April 29, 1998 and May 1, 1998 are hereby dismissed as untimely.

SPENCER, P.J. ORTEGA, J. VOGEL (M), J.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

02/24/98 DEPT. 44

HONORABLE REGINALD A. DUNN , JUDGE
D. LARSON DEPUTY CLERK

HONORABLE JUDGE PRO TEM

ELECTRONIC RECORDING MONITORED, REPORTER NONE

L. MITCHELL, CSL Deputy Sheriff

BC121888 Plaintiff
Counsel

PEOPLE OF THE STATE OF CALF

VS

Defendant NON
GLORIA MARSHALL AMERICA, INC. APPEARANCE
Counsel

NATURE OF PROCEEDINGS:

NOTICE OF SIGNING/FILING/ENTRY OF JUDGMENT

The Court having carefully read and considered the Objection by Defendants filed December 17, 1997, the Responses to Objections by Plaintiff filed February 19, 1998, and the Final Judgment lodged with the Court on December 2, 1997, now signs the Final Judgment as submitted.

Final Judgment is filed and entered this date.

Copy of this Minute Order is forwarded via U.S. Mail this date

to:

JERRY SMILOWITZ, DAG
ATTORNEY GENERAL'S OFFICE
300 S. SPRING ST., STE 5 NORTH
LOS ANGELES, CA 90013

STUART LYTTON, DDA
DANA ARATANI, DDA
DISTRICT ATTORNEY'S OFFICE
201 N. FIGUEROA ST., 16TH FLR.
LOS ANGELES, CA 90012

E. SCOTT FRASER, ESQ.
NELSON & NELSON
2029 CENTURY PARK EAST, STE 2700
LOS ANGELES, CA 90067-3214

MINUTES ENTERED

02/24/98

PAGE 1 OF 1 DEPT. 44

COUNTY CLERK

Filed 2/24/98

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,	) No. BC 121888
	) FINAL JUDGMENT
Plaintiff,	) [Honorable Reginald A. Dunn]
v.	) Dept.: 44
GLORIA MARSHALL AMERICA, INC.; FBS, INC.; MARK BERGENDAHL; KELLEE BERGENDAHL,	)
Defendants.	)

The above-entitled cause came on regularly for trial on August 7, 1997 in Department 44 of the above-entitled Court, the Honorable Reginald A. Dunn presiding without a jury, and was tried on that date through June 20, 1997. Plaintiff appeared by his attorneys, Jerry Smilowitz, Deputy Attorney General, Stuart Lytton, Deputy District Attorney, and Dana Aratani, Deputy District Attorney. Defendant appeared by his attorneys, Nelson & Nelson, by E. Scott Fraser, Esq., and Robert Sainberg, Esq. Following receipt of oral and documentary evidence the cause was argued and submitted for decision, and the Court having caused to be made and filed herein its written statement of decision,

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff, having met its burden o f proving by a

preponderance of the evidence that defendants violated various provisions of the Contracts for Health Studio Services Act (Civ. Code §§ 1812.80 et seq.) As well as having engaged in other acts of unfair competition in violation of Business and Professions Code section 17200, as set forth by plaintiff in paragraphs 11(A) through 11(L) of the First Cause of Action in its First Amended Complaint, with the exception of paragraphs 11(B) and (J) which this Court has dismissed pursuant to plaintiff's request, judgment on the allegations set forth in the remaining allegations of the First Cause of Action in the First Amended Complaint is granted in favor of plaintiff.

2. Plaintiff, having met its burden of proving by a preponderance of the evidence that defendants, in the sale of goods and services, made statements by way of written advertisements which they knew or should have known to be untrue, deceptive, or misleading in violation of Business and Professions section 17500, as alleged in the Second Cause of Action in its First Amended Complaint, judgment on the allegations set forth in the Second Cause of Action is granted in favor of plaintiff.

3. The Court finds that plaintiff has met its burden of proving by a preponderance of the evidence that certain business entities - G.M.F.C., Inc., Gloria Marshall Salon of Torrance, Redfield Taylor Associates, Inc., Gloria Marshall of Utah, Inc., Gloria Marshall International, Inc., Gloria Marshall Figure Salons of Australia Pty. Ltd., G.M.F.C. (Aust.) Pty. Ltd., International Health Industries Ohio, Inc. - and an individual, Gloria Sarno (aka Gloria Marshall, Gloria Bergendahl) were the alter egos of the named defendants, and that there existed such a unity of ownership and interest between the above-named business entities and Gloria Sarno, on the one hand, and the named defendants, on the other, that they all formed a single or unitary enterprise in committing those acts, practices, and representations alleged in plaintiff's First and Second Causes of Action in its First Amended Complaint. Accordingly, the Court grants judgment on both causes of action against the above-named business entities and Gloria Sarno (aka Gloria Marshall, Gloria Bergendahl) in favor of plaintiff.

4. Pursuant to Business and Professions Code sections 17206 and 17536, Gloria Marshall America, Inc., FBS, Inc., Mark Bergendahl, Kellee Bergendahl, Gloria Sarno (aka Gloria Marshall, Gloria Bergendahl), G.M.F.C., Inc., Gloria Marshall Salon of Torrance, Redfield Taylor Associates, Inc., Gloria Marshall of Utah, Inc., Gloria Marshall International, Inc., Gloria Marshall Figure Salons of Australia Pty. Ltd., G.M.F.C. (Aust.) Pty. Ltd., and International Health Industries Ohio, Inc. (hereafter, all of those business entities, Mark Bergendahl, Kellee Bergendahl, and Gloria Sarno shall be collectively be identified as "defendants"), on a joint and severable basis, shall pay to plaintiff civil penalties in the amount of two hundred thousand dollars ($200,000).

5. Pursuant to Business and Professions Code sections 17203 and 17535, defendants, on a joint and severable basis, shall set up a restitution fund in the amount of two hundred thousand dollars from which they shall make payment to the following:

A. All persons entitled to refunds as the result of salon closures who had received a partial refund based upon pro rata usage. Such refunds shall be based upon actual usage;

B. All persons entitled to refunds as the result of salon closures who have not received any payment from defendants. Such refunds shall be based upon actual usage;

C. Beatrice Baca, in the amount of four hundred eighty dollars ($480);

D. Patricia Haro, in the amount of four hundred dollars ($800).

One hundred twenty (120) days following entry of this Final Judgment, defendants shall present to the Court a list setting forth the names of persons to whom refunds have been made, and the amount of refund made to each. Thereafter,

upon further order of this Court, any remaining moneys remaining the restitution fund shall revert to defendants.

6. Costs are awarded to plaintiff in the amount of $18,601.40. Defendants on a joint and severable basis, shall pay this amount to plaintiff.

7. The Court finds that this is an appropriate case for the issuance of a permanent injunction, and good cause appearing, the Court issues the following:

PERMANENT INJUNCTION

That the injunctive provisions of this judgment are applicable to the offering of health studio services including but not limited to instruction, training or assistance in physical culture, body building, exercising, weight reduction, diet control, figure development, or any other such physical skill, or for the use by an individual patron of the facilities of a health studio, gymnasium, figure salon or other such facility used for any of the above purposes, or for membership in any group, club association, salon or organization formed for any of the above purposes by defendants, and in connection therewith, to the principals, officers, directors, employees, agents, licensees, representatives, successors and assigns of defendants, and to all persons, partnerships, corporations, and other entities, acting for, through or on behalf of, or in concert or participation with defendants who have actual or constructive knowledge of this Judgment.

Pursuant to Business and Professions Code Sections 17200, 17203, 17500, 17535 defendants are from the date of entry of this judgment permanently enjoined and restrained from, directly or indirectly, engaging in the following acts or practices in connection with any matter related to health studio services:

A. Failing to make pro rata refunds, based upon the patron's actual usage of health studio services, if a health studio closes.

B. Providing a contract to a patron for health studio services, with provisions for the relief of payment for services to occur in the event the patron moves further than 25 miles from the health studio, and such patron is unable to transfer the contract to a comparable facility, that requires that patron to submit a computer generated utility bill with her name at the new address or requires her to acquire and submit any other documentation evidencing such move - unless defendants prorate the amount of the refund from the date of her move.

C. Inserting a clause in a health studio services contract with a provision for the relief of payment for services, to occur in the event that a patron moves further than 25 miles from the health studio, and such patron is unable to transfer the contract to a comparable facility, that such person may be charged by a predetermined fee, unless defendants further disclose that the fee may not exceed one hundred dollars ($100), or, if more than half the life of the contract has expired, such person may be charged a predetermined fee not exceeding fifty dollars ($50), in violation of Civil Code section 1812.89(b)(2).

D. Provide contracts to patrons for health studio services that:

(i) Offer for sale the Gloria Marshall Quick Trim Menu Plan, Strategy Planner, Quick Trim Meal Replacement, or any related or similar products and make said products non-refundable, in violation of Civil Code sections 1812.85(b)(4), 1812.89(a)(1), 1812.89(a)(2) and 1812.89(b)(1). Defendants shall have no obligations to issue a refund for the Quick Trim Meal Replacement if the packaging has been open, torn or damaged, or otherwise shows any sign of tampering or adulteration. Defendants may not deduct from any refund a purported cost for the

Gloria Marshall Quick Trim Menu Plan, Strategy Planner, or any other related or similar products for which a patron has not paid any money under her contract.

(ii) Require patrons to pay a surcharge for using a credit card in lieu of payment by cash, check, or similar means, in violation of Civil Code section 1748.1(a).

(iii) Impose a twenty-five dollar ($25) administrative fee, in violation of Civil Code Sections 1812.85(b)(1) and 1812.85(b)(4), if a patron exercises her three-day right to rescind or cancel the contract.

(iv) Require a patron to include a copy of her contract along with a notice of cancellation, in violation of Civil Code §1812.85(b)(1).

(v) Include a definition of disability other the definition set forth in Civil Code section 1812.89(a)(3), or create any procedure or formula for calculation of refunds, in violation of Civil Code section 1812.89(a)(2), that obligates a patron who has a physical or mental impairment that prevents her from using the services to pay for the missed services, or denies a refund to a patron for that period of time that she was physically or mentally impaired.

(vi) Impose a twenty-five dollars ($25) administrative fee on refunds to those patrons or their estates who are unable to use the health studio services because of death or disability, in violation of Civil Code section 1812.89(a)(2).

E. Subtracting any amount from a refund unless

specifically permitted to do so pursuant to Civil Code section 1812.80 et seq.

F. Selling any pre-packaged food, drink, meal replacement or any other food, drink, or dietary supplement unless the patron is informed in her contract that she is not required to purchase the food or drink or dietary supplement.

G. Advertising or other representing the price of a session for health studio services in any manner other than stating the price of a one-hour session.

H. Offering a contract for health studio services that obligates a person to pay one thousand dollars ($1,000), exclusive of interest and finance charges. For purposes of this paragraph, all contracts for health studio services, which may be in effect between defendants and the same buyer, the terms of which overlap for any period, shall be considered as one contract.

I. Making any oral, visual or written representation, in connection with the offering of health studio services, that states or implies that patrons will lose, or lose up to, a specific number of inches or pounds, unless defendants maintain a comprehensive survey that substantiates the weight or inches reduction representations;

J. Making any oral, visual, or written representation, in connection with the offering of health studio services, that states or implies that a particular patron or patrons lost specific numbers of inches or pounds unless defendants and others disclose clearly and conspicuously that the weight or inches lost by those patron or patrons is not what consumers should expect to experience.

K. Making any oral, visual or written representations, in connection with the offering of health

studio services, that states or implies that results are guaranteed unless defendants and others disclose clearly, adequately, and accurately in immediate conjunction therewith:

4. The nature and extent of the guarantee;
5. The conditions and limitations on the guarantee;
6. Which programs are guaranteed
7. The duration of the guarantee
8. The manner in which defendants will perform

L. Selling the Quick Trim Meal Replacement or any related or similar product, if defendants and others make any oral, visual, or written representations, in connection with the offering of health studio services, that there are no pre-packaged foods or no pre-packaged foods offered or required for a patron's participation in the health studio's weight reduction services.

M. Requiring payment for a minimum or specific number of sessions for health studio services unless the sessions offered represent the total sessions necessary for a patron to achieve her goal weight.

Dated: February 24, 1998

/s/

HONORABLE REGINALD DUNN
Judge of the Superior Court

5/20/98 Costs affixed per Memo of Costs filed 3/5/98, D. Larson Clerk Deputy

Filed 10/30/97
John A. Clarke, Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA PLAINTIFF, v. GLORIA MARSHALL AMERICA, INC.; FBS, INC.; MARK BERGENDAHL; KELLEE BERGENDAHL; and DOES 1 through 20, inclusive, DEFENDANTS.	Case No. BC 121888 STATEMENT OF DECISION

The above-entitled cause came on regularly for trial on April 7, 1997 in Department 44 of the above-entitled Court, the Honorable Reginald A. Dunn presiding without a jury, and was tried on that date through June 20, 1997.

Following receipt of oral and documentary evidence the cause was argued and submitted. The Court having considered the evidence as well as arguments of counsel now issues the following statement of intended decision.

Plaintiff has stated two separate causes of action alleging acts of unfair competition in violation of Business and Professions Code section 17200 and making untrue or misleading statements in order to sell goods or services in violation of Business and Professions Code section 17500. Additionally Plaintiff has argued that the evidence requires that other business entities should share in the liability of the named defendants on a theory of single or

unitary enterprise.

FIRST CAUSE OF ACTION

Business and professions Code section 17200 defines unfair competition to include any "...unlawful, unfair or fraudulent business act, practice or unfair, deceptive, untrue or misleading advertising or any act prohibited by Chapter 1 of part 3 of division 7 of the Business and Professions Code. These sections are directed at and encompass violations of statutory and regulatory law constituting unfair competition and unfair business practices not addressed specifically by statute including business practices which offend public policy or are unethical, oppressive, or substantially injurious to customers.

It has been alleged and proved by a preponderance of the evidence that defendants violated various provisions of the Contracts for Health Studio Services Act (Civil Code §§ 1812.80 et seq.) As well as having engaged in other acts of unfair competition, as set forth by plaintiff in paragraphs 11(A) through 11(L) of the First Cause of Action in its First Amended Complaint, with the exception of paragraphs 11(B) and 11(J), which this court has dismissed pursuant to plaintiff's request. Accordingly, the Court finds for plaintiff and against defendants GMA, Inc., Mark Bergendahl and Kellee Bergendahl on the First Cause of Action.

SECOND CAUSE OF ACTION

Plaintiff has alleged and proved by a preponderance of the evidence that the defendants, in the sale of goods and services, made statements by way of written advertisements which they knew or should have known to be untrue, deceptive or misleading in violation of Business and Professions Code section 17500. Accordingly, the Court finds for the plaintiff and against defendants GMA, Inc., Mark Bergendahl and Kellee Bergendahl on the Second Cause of Action.

ALTER EGO/SINGLE ENTERPRISE

In ruling on the Plaintiff's allegations that the facts of this case require that other business entities should share in the liability of the named defendants under a theory of single or unitary enterprise the Court adopts as its own the Plaintiff's statement of intended decision as modified below.

The theory of single or unitary enterprise or alter ego theory is normally applied to parent-subsidiary corporate relationships; however, where the facts require, it has been extended to include sister companies. The theory has been described as follows: "In effect what happens is that the court for sufficient reason, has determined that though there are two or major personalities, there is but one certain component elements of it. The Court thus has constructed for the purposes of imposing liability, an entity unknown to any secretary of state comprising assets and liabilities of two or more legal personalities; endowed that entity with the assets of birth, and charged it with the liabilities of both." Las Palmas Associates v. Las Palmas Center Associates 235 Cal.App.3d 1220.

The rationale for applying a single enterprise theory is stated succinctly:

"Because society recognizes the benefits of allowing persons and organizations to limit their business risks through incorporation, sound public policy dictates that imposition of alter ego liability be approached with caution. Nevertheless, it would be unjust to permit those who control companies to treat them as a single or unity enterprise and then assert their corporate separateness in order to commit frauds and other misdeeds with impunity." Id. at 1249.

The Las Palmas court noted that one key factor is whether one business made loan guaranties to the other. In Roman Catholic Archbishop v. Superior Court (1971) 15 Cal.App.3d 405, 411, the Court emphasized that "(a)mong the factors to be considered in applying the doctrine are ... holding out by one entity that is liable for the debts of the other ..." No single factor is dispositive. As the

California Supreme Court stated in Mesler v. Bragg Management Co. (1985) 39 Cal.3d 290, 306: "There is no litmus test to determine when the corporate veil will be pierced; rather the result will depend on the circumstances of each particular case. There are nevertheless, two general requirements: (1) `that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.'" (Citation omitted) In Associated Vendors Inc. v. Oakland Meat Co. (1962) 210 Cal.App.2d 825, 842, the court expanded on this latter prong:

"The purpose of the doctrine is not to protect every unsatisfied creditor, but rather to afford him protection, where some conduct amounting to bad faith makes it inequitable, under the applicable rule and cited, for the equitable owner of a corporation to hid behind its corporate veil."

Numerous factors can singly, or in conjunction with each other, establish an alter ego relationship. Associated Vendors, supra, 210 Cal.App.2d at 838-840 lists over two dozen, many of which apply here: "... the holding out by an individual that he is personally liable for the debts of the corporation; ... the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities ...; the identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities in the responsible supervision and management; sole ownership of all of the stock in a corporation by one individual or the members of a family ...; ... the use of the same office or business location; the employment of the same employees and/or attorney ...; ... the failure to adequately capitalize a corporation ...; ... the disregard of legal formalities and the failure to maintain arm's length relationships among related entities ...; ... the use of the corporate entity to procure labor, services or merchandise for another person or entity; ... the diversion of assets from a corporation by a stockholder or other person or entity, to the detriment of creditors,

or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another ..." The application of "any of these factors, as well as the consideration of any other circumstances which would have warranted the trier of fact to disregard the corporate entity, were within the province of the trial court." Id. at 840.

Plaintiff has submitted numerous factors to establish an alter ego relationship. These factors include the following:

Defendants Mark Bergendahl and Kellee Bergendahl are married, and have been since the 1980's. Gloria Sarno is the mother of Mark Bergendahl. Gloria Sarno is married to Ron Sarno.

Mark Bergendahl is president of Jacobson Larson. During the period of 1990 to 1994, Mark Bergendahl was vice president of GMFC, an overseas direction for GM Australia. During this time, he was also president and partial shareholder of GMA, Gloria Marshall International, and Redfield Taylor and Associates. Mark Bergendahl was also president and partial shareholder of GM Utah and International Health Industries of Ohio.

Kellee Bergendahl was the vice president and partial shareholder of GMA, GM Utah and International Health Industries of Ohio.

Gloria Sarno is and was the president and sole shareholder of GMFC, Inc. She was also a partner in GM Torrance, with her husband, Ron Sarno. Gloria Sarno is also an overseas director of Gloria Marshall Figure Salons of Australis Party Limited. She is the actual Gloria Marshall whose name and pictures appear in various advertisements. Presently, Gloria Sarno is the sole shareholder of Jacobson Larson. According to Gloria Sarno, Jacobson Larson provides management services to GM Australia. Previous, GMFC provided those services. (See "Management Agreements" below.) Mark Bergendahl participated in the financial aspects of the management contract. Gloria Sarno is in the process of moving the management operation to Australia.

Gloria Sarno testified that Mark Bergendahl, as president of Jacobson Larson, never received payment for his services. Yet, Mark Bergendahl testified that he earned $120,000 last year from Jacobson Larson.

GMA had three different addresses at various times. Exhibit 1 shows that corporate addresses were at: (1) 6615 East Pacific Coast Highway, Long Beach, California for the period of 1987 to July 30, 1990, (1) 3020 Old Ranch Parkway, Suite 410, Seal Beach, California for the period of August 1, 1990 to October 31, 1994, and (3) 7755 Center Avenue, Suite 600, Huntington Beach, California for the period of November 1, 1994 to the present. Exhibit 2 shows that GMFC had the exact same corporate addresses, at the exact times, as GMA.

Additionally, other Gloria Marshall entities were located at these same offices at the same time (while they existed). These included: GM International, GM Utah, and International Health Industries of Ohio (GM Ohio). It is apparent that GM Torrance employees took place at these offices. Additionally, Jack Perkins testified that his meeting with Mark Bergendahl, Gloria Sarno and Patricia Townsend would take place at either the Long Beach or Seal Beach corporate office, depending on the time frame. The advertising issues that were discussed included all of the California salons, as well as the advertising for the Australian salons.

A review of the office layouts of the locations (Exhibits 373 to 375) reflect the sharing of many common areas within the suite. There was one reception area, a lunch room, and a single conference room. The suite, according to Mark Bergendahl, would only identify one business on the door. Within the office, there were no signs identifying separate entities. In the reception area, an employee would be stationed presumably to greet visitors. Mark Bergendahl did not know who paid this employee. Exhibit 373 depicts the Seal Beach location. It shows where the principals and employees worked within the office

suite, along with what entity Mark Bergendahl testified such principals and employees were connected.

Within the entities moved from one office location to another, they would all move together. Mark Bergendahl did not know who paid for the move. GMFC paid the lease while GMA and the other entities were located in the office suite. GMA never reimbursed GMFC for the lease payments.

Page 00124 of Exhibit 193 shows a letter, dated November 10, 1988, with GMFC letter head signed by Marcia Davis, identified as Director of Special Projects, Also shown on that page is a business card of Marcia Davis with the same title. The card stated "Gloria Marshall Figure Salons Pty. Ltd." and also states "International Headquarters," along with the Long Beach address. (See the Long Beach address shown in Exhibits 1 and 2.) When asked about this card, Mark Bergendahl admitted that it was an Australian Company due to the "Pty. Ltd." designation.

Additionally, Exhibit 238, page "plfs - 4-A" shows a business card that was given to Patron Mary Sullivan when she sued defendants in small claims court. This card was given by Ann Beasley in 1995 and identifies her as Director of Field Operations for Gloria Marshall International, Inc., with the National Headquarters (emphasis added) at 7755 Center Ave., Suite 600, Huntington Beach, California 92647.

Exhibit 8, page 5, shows that G.M.F.C., Inc. was created "(p)rimarily to establish and operate figure control salons for women." There is no evidence to show that this purpose has changes in the corporate records kept by the Secretary of State. Indeed, page 3 of Exhibit 8, shows a document with a wording at the bottom of the page stating: "I declare there has been no change in the information contained in the last statement of corporation which is on file in the Secretary of State's Office." Beneath this wording is the signature of Gloria Bergendahl, dated December 31, 1990.

Additionally, Mark Bergendahl admitted that he though that GMFC may have meant "Gloria Marshall Figure Control." Jack Perkins also testified that he thought that GMFC meant "Gloria Marshall Figure Control."

Gloria Sarno testified that, in the 1960's, she and her first husband, Allen Bergendahl, created Gloria Marshall Figure Salons. Gloria Sarno owned the trade name Gloria Marshall, and authorized the use of the trade name to other corporations that owned and operated Gloria Marshall Figure Salons.

Between 1966 and 1982, ten separate corporations located at the same corporate headquarters in Downey managed all of the Gloria Marshall salons located throughout the United States. Allen Bergendahl had a proprietary interest in all ten corporations. During those years, GMFC, Inc., owned and operated Gloria Marshall Figure Salons from the Downey location. Gloria licensed GMFC, Inc., to use the trade name "Gloria Marshall".

International Services Industries, Inc., (hereinafter "ISI"), owned by Allen Bergendahl and Sid Craig, was a Utah Corporation with its principal place of business located in Downey. However, Gloria Sarno believed that ISI was an Ohio Corporation. ISI owned and operated Gloria Marshall Figure Salons.

According to Mark Bergendahl, GMFC loaned GMA a significant amount of money. To ensure repayment of this money, GMFC and GMA entered into an agreement to allow GMFC to collect the installment payments directly from a patron. This was accomplished through the ACH (automated clearing house) system. The ACH system allows a company to go directly into the personal bank account of a customer or patron and collect the money that is due to the company. Since GMFC did not have its own ACH system, GM Torrance performed the ACH function on behalf of GMFC. Exhibit 370 shows this relationship. The agreement was not in writing.

Kimberly Saalfeld also testified to this arrangement. She was shown page 14 of Exhibit 307 (the GMA general ledger for January 1993) and asked to look at the entry at the bottom of the page with the description "ACH collected by GMT/GMFC," with the amount of $51,182.85 (account number 1201 - Account Receivable - GMFC"). Kim Saalfeld noted that this represented the amount collected by GMT/GMFC under the ACH arrangement for January 1993. This entry was entered in the same way on a monthly basis using account number 1201, titled "Accounts Receivable - GMFC" with the description "ACH collected by GMT/GMFC." A summary of the amounts shown in the general ledgers is as follows (NOTE- this list included only those amounts that fit the transaction description above, i.e., account number the same, account title the same, and description the same):

1993:

January	$ 51,182.85	Exhibit 307, page 14
February	52,166.25	Exhibit 308, page 12
March	57,829.17	Exhibit 309, page 15
April	64,595.17	Exhibit 310, page 11
May	63,338.65	Exhibit 311, page 9
June	72,650.25	Exhibit 312, page 14
August	80,944.75	Exhibit 314, page 14
September	82,342.25	Exhibit 315, page15
October	77,591.55	Exhibit 316, page 15
November	73,233.30	Exhibit 317, page 15
December	71,008.76	Exhibit 318, page 5

SUBTOTAL: $746,882.95

1994: (The description used in 1994 was "ACH collected by GMT")

April	$ 26,316.81	Exhibit 322, page 2
May	11,945.88	Exhibit 323, page 13
June	427.00	Exhibit 324, page 3

July	73.14	Exhibit 325, page 3
August	100.00	Exhibit 326, page 3
September	80.00	Exhibit 327, page 3
October	73.00	Exhibit 327, page 2
November	76.00	Exhibit 328, page 2
TOTAL:	$785,974.89	

Based on the description of the accounting entry by Kimberly Saalfeld, these are the amounts that were collected by GM Torrance on behalf of GMFC. The amounts that could be accounted for above are not inconsistent with the amount shown collected by GM Torrance/GMFC on Exhibit 370 ($1 million based on the testimony of Mark Bergendahl).

The ACH agreement essentially pulled at least $785,974.78 (probably closer to $1 million) from the collections of GMA, which in turn had come from GMA patrons. Yet, the installment payments from the patrons never touched a bank account of GMA. Instead, GMFC was guaranteed repayment of amounts it previously forwarded to GMA by extracting (through GM Torrance) amounts from GMA patron bank accounts. In effect this automatically prioritized GMFC above the patrons for payment should GMA fall into financial difficulties. Clearly the above amounts would have covered the refunds to GMA patrons as a result of the salon closures. However, the money ended up securely in the possession of GMFC. Gloria Sarno testified that she wanted this arrangement to insure repayment by GMA. Importantly, Mark Bergendahl himself testified that GMFC had never paid any refunds. As a result, GMFC benefitted at the expense of the GMA patrons.

The general ledgers of GMA and GM Torrance had an intercompany account for each of the other entities. These accounts were titled: "Intercompany - G.M.F.C.," Intercompany - Redfield Taylor," "Intercompany - G.M. Australia," etc. Examples of these accounts are shown on pages 7 to 9 of Exhibit 318. Each account has a beginning balance ("balance forward" from the last period), the transactions during the current period

(with a general ledger comment) and an ending balance.

The transactions during the current period reflect the activity for each respective month on the general ledger. Exhibit 318, the general ledgers pertain to December of 1993. As such, the transactions within a particular intercompany account show an alleged transfer of funds to or from that entity shown in the title of the intercompany account. Throughout the general ledgers, there are a significant number of entries between GMA and the other entities, as well as GM Torrance and the other entities. Due to the frequency and nature of these transactions, Dr. Stone formulated the opinion that the companies were not operating independently.

A review of the general ledgers of GMA (Exhibits 280 through 335) shows significant activity in the intercompany accounts of GMFC and GM Australia. In July 1991, the general ledgers showed a balance of $213,356.81 (Exhibit 286, page 3) in the Intercompany - GM Australia account. This amount falls to $3,448.81 in May 31, 1993, (Exhibit 309, page 16). The Intercompany - GMFC account showed even greater variation.

In July 1993, the Internal Revenue Service closed the GMA salons for nonpayment of taxes. Approximately $435,000 was owed to the IRS. To pay this amount GMA received $435,000 from GMFC, and in turn paid the IRS. The salons were quickly reopened. This amount was considered a loan by defendants. In Exhibit 270, there are two alleged loan agreements covering this amount. These loans were treated on the general ledgers of GMFC as follows: Exhibit 356, page 9, identifies: "loan receivable - GMA" with a beginning and ending balance for the fiscal year 3ending November 30, 1993. The beginning balance is $6,200 (the amount owed to GMFC by GMA). Later in that year an entry for $400,000 is added, which increases the amount owed by GMA to $406,200. Oddly enough, the date of the entry is January 4, 1996, more than two years after the end of the fiscal year. One other entry was made, adding $8,000 to the loan receivable amount. This was also a

late entry dated January 15, 1996. As such, prior to January 4, 1996, the general ledgers of GMFC reflected an ending balance in "loan receivable - GMA" of $6,200 at November 30, 1993. In other words, for more than two years after the close of the fiscal year, the general ledger of GMFC did not reflect an amount of $408,000 owed by GMA. These general ledgers were turned over to plaintiff only after a motion to compel and discovery hearing held on January 3, 1996.

Gloria Sarno testified as to this transaction. In July 1993, Mark Bergendahl requested money from Gloria Sarno to cover the IRS liability. Gloria Sarno then called GM Australia and instructed Dale Falconer, its president, to obtain a loan for $435,000 from its bank. GM Australis obtained the loan and transferred the money to GMFC. Subsequently, GMFC gave the money to GMA.

According to Gloria Sarno, Mark Bergendahl prepared the note for $435,000 (Exhibit 197, page 14) and rewrote the contract to reflect the actual amount of the loan for $450,000 (Exhibit 197, pages 15 to 16). Gloria Sarno did not participate in any negotiations in the formation of the pages 15 and 16. Also, she never enforced any provision of the loan agreement, stating that GMFC "wrote off the loan."

Dr. Ronald Stone, a financial expert called as a witness by the plaintiff, testified as to a write-off of management receivables of $153,000 from GM Australia that was due to GMA. This write-off is shown on Exhibit 318, page 9. These management fees receivables stayed on the ledgers of GMA throughout 1993 (January 1993 general ledger, Exhibit 307, page 16), thus indicating that such amount had been considered due for at least a year.

GMA appears to have borrowed significant sums from Gloria Sarno personally. (Exhibit 331, page 7.) Gloria Sarno testified that she personally co-signed a $775,000 bank loan to GMA. She is repaying the loan to the bank. There is no

evidence of written loan agreements between GMA and Gloria Sarno personally. Pursuant to plaintiff's discovery request, the only loan agreements received from defendants were those shown in Exhibit 270.

Exhibit 270, pages 4 to 14, purportedly represent loans from GMFC to GMA, Bob Barkatelly, the controller for GMFC and GMA, or her son Mark, Vice President of GMFC and President of GMA prepared the loan agreements. When asked, Gloria Sarno did not know the capacity of the person writing the agreements. Additionally, Gloria Sarno did not know the capacity of the person writing the agreements. Additionally, Gloria Sarno did not know that GMA sold its salon equipment to GM Utah or GM Ohio. (The loan document allows GMFC to obtain GMA equipment and other assets to protect the collateral of the loan.)

Gloria Sarno testified that all loans to and from GMA and GMFC were recorded and notes or contracts were prepared. GMFC loaned approximately 1.7 million to GMA. However, the loan documentation, obtained pursuant to discovery, totals $662,500 (including Exhibit 15 and 16, the "NOTE AND SECURITY AGREEMENT"). When confronted with the discrepancy between Exhibit 270, pages 1 to 16, and her testimony regarding the amount of money loaned to GMA, Gloria Sarno did not know if more loan documentation existed.

Most of the loans were unsecured.

Dr. Stone testified as to the late accounting entries. The date that an accounting entry was made was shown in the general ledgers next to the entry itself. Kimberly Saalfeld testified that late entries were made, but such entries would be made within 8 months of the end of the year for tax purposes. What is unusual is the number of entries made more than a year (and sometimes more than two years) after the end of the year in which the accounting records pertain. Kimberly Saalfeld wasn't the only person to perform accounting functions for the

entries. Clearly, someone was making these unusual entries. In the GMFC general ledgers, Exhibit 356, pages 73 through 83, there is a whole group of accounting entries made on the dates beginning January 2, 1996 through February 16, 1996. However, these general ledgers were for the fiscal year ended November 30, 1993. More than two years passed before the entries were made. These entries affect the accounts receivables of GMFC and record amounts due to GMFC from GMA.

GMA has similar entries. An example is shown on Exhibit 318, pages 8 and 9, where entries are made on August 15, 1995 when the fiscal year ended December 31, 1993. Here 19 months passed before the entries were made. On the GM Torrance general ledgers, late entries are shown on Exhibit 344, pages 8 and 9 (G/L period 1 fiscal year 94). Here, there are entries made on January 31, 1995 in the general ledgers for January 1994. These entries deal with GMA.

What is significant is that one finds this type of accounting in the books of all three entities. Kimberly Saalfeld herself stated, that at the latest, the books should be closed within eight months from the end of the year. No doubt, these entities pay taxes, or at the very least, file tax forms. If it is presumed that those entities file tax forms on time, clearly changes are made to the accounting books long after the forms are filed. The fact that GMA, GM Torrance and GMFC engage in the same suspicious accounting conduct is a factor in showing that they operate as a single entity.

Exhibit 184 shows the licensing agreement between GMA and GMFC. The license permits the use of the Gloria Marshall name for $10.00. No conditions for the use of the license are listed in the agreement. Mark Bergendahl testified that no supervision of the license took place, nor were there any controls dictated by Gloria Sarno or GMFC as to the use of the license. Gloria Sarno testified that she never reviewed any policy or procedure manuals of GMA to verify that GMA provided the Gloria Marshall program to its patrons. Similarly,

she never reviewed the GMA patron agreements (Exhibit 193, pages 1 to 6) to determine if they were in compliance with the "Contracts for Health Studio Services" laws. Gloria Sarno testified that she knew about the laws because she and Mark discussed the law when creating GM Torrance patron agreements before she opened the Torrance salon (Exhibit 193, page 7).

The license agreement was terminated on May 31, 1994 (Exhibit 185 and Exhibit 197, page 00027). Gloria Sarno testified that GMFC and GMA terminated the license agreement because of negative publicity and the amount of money GMFC had given to GMA. However, she did not know if GM Utah or GM Ohio had a license agreement with GMFC at the time of the GMA closing (which were still in existence). Also Gloria Sarno did not know the names of the principals of GMA and GM Ohio.

GMFC's insurance of its trademark to GMA warrants extended scrutiny here. The apparent nakedness of the license agreements supports Plaintiff's argument that GMFC is the alter ego of GMA. For purposes of preserving both the goodwill built up in the mark, as well as the validity of the trademark reservation, a licensor at arms length with its licensee is likely to have retained some control in the agreement, even if only the right to unilaterally cancel the license.

While the absence of supervisory controls in a license ordinarily signals involuntary trademark abandonment and the forfeiture of trademark protection, courts have made an exception when the parties have engaged in a close working relationship. In licensing its trademark, GMFC provided GMA with the mans to mislead the public and engage in unfair business practices. By placing into the hands of its licensee the means to mislead the public, GMFC has violated section 17200 and section 17500.

In California, the seminal decision addressing the

liability of a trademark licensor for the acts of its licensee is Kasel v. Remington Arms Co. (1972) 24 Cal.App.3d 711, a personal injury products liability case. The defendant (Remington) licensed its trademark to a Mexican firearm ammunition manufacturer (CDM). Injured by a defective CDM shell, the plaintiff brought a strict liability action against Remington. The Second District Court of Appeal held that in utilizing an enterprise stream of commerce liability, a Court may find a trademark licensor liable for the acts of a licensee by considering, inter alia, such factors as the licensor's organization, control, and financing of its licensee, and the amount of royalties it received. The court stressed that is "decision (was) confined to the specific facts of this case, "including that Remington retained rights of control over the quality of CDM's product. Id. At 739.

The Kasel court adopted the approach of finding liability by looking at the trademark licensor's role as a link in the marketing enterprise. While Kasel analyzed the issue based on the policies underlying the stream of commerce theory, that the doctrine of strict tort liability for defective products is applicable to the overall producing and marketing enterprises responsible for placing such products in the stream of commerce, the court also acknowledged consumer reliance on the trademark name as a factor in imposing the liability. The imposition of strict liability was based, in part, on the "defendant's participatory connection ... with the enterprise that created consumer demand for and reliance upon the produce." Id. At 725.

In a footnote, the Kasel court cited with approval an article entitled, Tort Liability of Trademark Licensors, 55 Iowa L.Rev. 693 (1970), which advocated the extension of products liability to include trademark licensors. The court quoted the following conclusion:

"It is inconsistent to hold producers, manufacturers, and other in the line of supply to a standard of care with respect to the public, and at the same time permit the trademark owner to

escape this responsibility by entering into a license agreement. If the mark owner were to utilize the mark on his own product, the traditional theories of products liability would provide the injured consumer with a remedy. The facts that the trademark is an important factor in consumer product selection and that the mark owner has a great influence on the quality of the final product are not changed by the licensing agreement. All that is changed is the mark owner's duty to the public with respect to these products." Kasel, 24 Cal.App.3d at 725 n. 17.

Although this action is not a strict liability action for a defective product, but instead, an action on behalf of consumers injured by false and deceptive advertising and unfair competition practices, some of the principles for finding a trademark licensor liable under Kasel are applicable here.

In this case, GMFC played a significant role as a link in the marketing enterprise both in its financial involvements with GMA, its participation in media advertising with GMA, and significantly in its licensing of the Gloria Marshall mark to GMA. If "trademark is an important factor in consumer selection," (Ibid.), then it follows that licensing a trademark is itself an important link in a marketing enterprise. Goodwill built up in the Gloria Marshall name created demand for GMA's services and induced reliance on the part of consumers. GMA patrons stated that they enrolled in the program because of their reliance on the Gloria Marshall name. Use of the mark in advertising and marketing created the impression that the licensor was responsible for the services that stood behind them. Therefore, GMFC's act of licensing the mark was an integral part of placing the trademark service into the stream of commerce.

Other cases in California have found the trademark licensor liable for the acts of the licensee in actions other than strict liability for defective products. Two such cases, Beck v. Arthur Murray, Inc. (1966) 245 Cal.App.2d 976, and Nichols v. Arthur Murray, Inc. (1967) 248 Cal.App.2d 610, were actions

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IN THE
SUPREME COURT OF THE UNITED STATES

GLORIA SARNO, G.M.F.C., INC.,
GLORIA MARSHALL SALON OF TORRANCE,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ of Certiorari
To The Second District Court Of Appeal
Of The State Of California

APPENDICES TO PETITION FOR WRIT OF CERTIORARI
(Volume II, App. 46 - 90)

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46pp

brought under the Dance Act, California Civil Code section 1812.50 et seq. to recover monies prepaid under contracts for dancing lessons which were not furnished. The Dance Act, regulating contracts for dance studio lessons, is very similar and parallel in construction to Civil Code section 1812.80, regulating contracts for health studio services, several provisions of which the defendants are alleged to have violated in the present complaint.

GMA patrons reasonably believed they were dealing with Gloria Marshall Figure Salons as a business entity. As noted, GMA and GM Torrance engaged in joint advertising using the same Gloria Marshall trademark and toll-free "800" telephone number, and each used patron agreements under the same trademark. When GMA salons closed, patrons were notified they could use salons operated by the other Gloria Marshall entity, yet the notices did not mention that these salons were owned by a separate entity.

Notwithstanding the testimony of the Bergendahls and Gloria Sarno, GMFC is likely to have known of GMA's illegal practices and deceptive advertising. The two entities shared commercial offices and engaged in many "inter-company" business transactions. The same controller and other employees and independent contractors worked for both entities. Since Mark Bergendahl served as both vice president and employee of GMA, as well as president of GMFC, GMFC cannot reasonably argue that it did not "know" of GMA's practices.

Exhibit 258 shows Gloria Sarno as a guarantor of GMA lease (Orange salon). Exhibit 263 shows Mark Bergendahl signing for GMFC as a guarantor of a GMA lease. This lease was for the Laguna Hills salon. Exhibit 255 shows GMA taking over a lease that was previously held by GMFC. This lease pertained to the Lakewood salon.

GMA and GM Torrance engaged in joint advertising. (Exhibit 28, pages 022 - 041). The Torrance and Cerritos salons

were listed along with the salons of GMA. Readers of the advertisements were led to believe that the salons fell under one entity, the "Gloria Marshall Figure Salons." Moreover, prospective patrons were led to believe that Gloria Marshall herself had some connection with the salons through the extensive use of her picture. The name "Gloria Marshall Figure Salons" was used throughout the United Stat4es and Australia.

Additionally, Mark Bergendahl and Gloria Sarno testified as to the use of the 1-800-2 TRIM ME phone number depicted in the advertisements. Calls to this number were directed automatically to the closest salon location. GMA and GM Torrance salons were included in this system.

Redfield Taylor and Associates handled the advertising for the Gloria Marshall salons. No other purpose is known. Of course, there are numerous transactions shown between GMA and Redfield Taylor on the GMA general ledgers, just as there are transactions between GM Torrance and Redfield Taylor in the GM Torrance general ledgers (e.g., Exhibit 344, period 5 fiscal year 94, page 2). What is interesting, however, is the number of transactions between GMFC and Redfield Taylor as shown on the general ledgers of GMFC. Examples of these are shown in Exhibit 356 and are as follows:

Exhibit 356

Page 15	Check Number 4953	$4,000
Page 18	Check Number 5011	$2,800
Page 26	Check Number 5215	$6,000
Page 28	Check Number 5254	$1,700
Page 51	Check Number 5849	$2,000
Page 54	Check Number 5895	$4,000
Page 55	Check Number 5928	$ 800
Page 123	Check Number 7205	$2,000
Page 130	Check Number 7367	$2,000
Page 133	Check Number 7462	$2,000

These transactions occurred when Mark Bergendahl was president of Redfield Taylor and Vice President of GMFC. Yet, when questioned regarding some of these transactions, Mark Bergendahl could not give a sufficient answer.

Jack Perking, who had extensive dealings with the Gloria Marshall Salons, testified that he thought that he was dealing with one large entity being run by Gloria Sarno. His billings were split only between the United States and Australian operations. He never even knew of a Gloria Marshall America or a business known as Gloria Marshall of Torrance. Advertising was discussed between himself, Mark Bergendahl, Patricia Townsend, and Gloria Sarno. These discussions took place at the corporate office and covered advertising for all the salons in Southern California.

Julie Favata worked as a clerical person for "Gloria Marshall Figure Salons" in 1978 at the "corporate office" in Downey. She testified that while she was employed at Gloria Marshall, she met Bob Barkatelly, who was the controller for the "Gloria Marshall Figure Salons." Subsequently, in the early 1980's, Ms. Favata obtained other employment in the health studio industry at either Jenny Craig or Nutrasystem.

In 1989, Sonia, an employee of Gloria Sarno, offered her a job with the Gloria Marshall Figure Salons, It should be noted that Julie Favata did not know, at the beginning of her employment, that she was an employee of Gloria Marshall America. Initially, she was not aware of the existence of separate corporate entities. Later, she found out that she worked for Mark and Kellee Bergendahl's salons (GMA). Eventually, she moved on to work for GM Torrance.

Julie Favata sold memberships at all of the grand openings of Gloria Marshall salons between 1991 and 1994. While employed at GM Torrance she recalls participating in the grand openings of the following GMA salons: West Covina, Puente Hills, Arcadia, West Los Angeles, Glendale, and

Sherman Oaks. When Gloria Sarno opened her Torrance salon in 1990 or 1991, Julie, then a GMA employee, sold memberships at the "grand opening." Grand openings last for approximately three to four weeks. During the Torrance grand opening, her employment status at GMA did not change.

In 1994, when employed as a supervisor at GM Torrance, Mark and Kellee Bergendahl utilized her services to sell memberships in three separate GM Utah salon grand openings. Gloria Sarno did not replace her and Julia Favata maintained phone contact with GM Torrance managers while she worked in Utah. In effect, during her involvement with GM Utah grand openings, Julie Favata was absent from the GM Torrance salon operations for approximately three months.

When recruited to work at the Torrance grand opening, neither Gloria Sarno nor GM Torrance required Julie Favata to learn any new salon procedures. In effect, no training was offered or required. Similarly, GM Utah did not provide Julie Favata with any training for the openings of the three Utah salons. The procedures, forms, and operations of the different corporate salons, in effect, were the same or similar.

Julie Favata also testified to various documents with corporate information on the GMA and GMA Torrance salons. These documents were disseminated to all GMA and GM Torrance managers. Each single document contained figures and transactions for both GMA and GM Torrance salons. For example, Exhibit 199, page 00256, the "Gloria Marshall America Inc. July 1991 Sales Figures", included Torrance and Cerritos sales figures. Page 00256 was admitted, but plaintiff did not include page 00257 because it was not listed as an exhibit. However, Julie Favata testified that the exhibits contained sales figures for GMA and GM Torrance salons.) Again, Exhibit 199, pp. 00645-00646 are GMA March 1991 sales figures that include Cerritos and Torrance.

Exhibit 199, pp. 00530 to 00538 are documents that

tracked detailed daily individual salon transactions or information for a particular month. These exhibits tracked transactions such as refunds, sales, ACH, Gross, Quick Trim sales, leads, advertising, bonus, etc., for each individual salon. Exhibit 199, pp. 00530 to 00538 include Torrance, Cerritos and GMA salons. Each salon was assigned a number. Torrance was 03 and Cerritos was 4. Each GMA salon had it own number. In any event, Julie Favata testified extensively about these documents and she explained the meaning of each transaction description.) Similarly, Exhibit 199, page 00276, is the same document for the Orange/Westminster figures.

According to Julie Favata, weekly reports of salon sales information and weight loss records of patrons were sent to the corporate office every Friday or Monday. These documents were sent by mail to the corporate office, but not directed to any specific person at the corporate headquarters in Seal Beach.

Julie Favata received the following memorandums, each dated April 1, 1991, while employed at either GM Torrance or GMA. Exhibit 199, page 00266, admitted into evidence, is a memorandum written on Gloria Marshall Figure Salons stationary that is addressed to "ALL SALON PERSONNEL". The memorandum states in part: "PLEASE JOIN US IN WELCOMING FLORENCE BROWN TO THE GLORIA MARSHALL TEAM. FLORENCE HAS BEEN NAMED THE LOS ANGELES REGIONAL SUPERVISOR AND WILL BE IN CHARGE OF THE EXISTING L.A. SALONS (CERRITOS, TORRANCE, AND WEST LOS ANGELES) AND WILL CONDUCT THE EXPANSION OF BOTH THE LOS ANGELES AND VALLEY AREAS." The second memorandum, Exhibit 199, page 00267, was admitted into evidence. It is addressed to "ALL SALON PERSONNEL". This document states: "PLEASE JOIN US IN CONGRATULATING NIKKI SAMUELSON IN HER RECENT PROMOTION TO THE POSITION OF SENIOR MANAGER OF THE WESTMINSTER SALON. NIKKI STARTED WITH GLORIA MARSHALL'S AS A COUNSELOR AT THE LAKEWOOD AND TORRANCE SALONS. SINCE

THEN, SHE HAS BEEN A SUCCESSFUL ASSISTANT AT THE ORANGE SALON."

According to Julia Favata, senior management meetings included managers from Torrance, Cerritos, and GMA salons. These meetings took place at the corporate headquarters in Seal Beach. While Julie Favata was a senior manager for GM Torrance, she would have meetings about once a month with Mark and Kellee Bergendahl. Kellee Bergendahl generally ran these meetings. If Kellee Bergendahl was not present, one of her trainers, probably Diane McCay, would be in charge. At these meetings, promotions and sales figures would be discussed. On page 290 of Exhibit 198, Julie Favata states that manager training meetings had both Cerritos and Torrance managers along with Mark and Kellee Bergendahl's managers. They would be all in the same room, and taught by the same instructors. Moreover, in Exhibit 198, on page 388, Julie Favata testified regarding training sessions. She testified that, during these sessions, at no time was there ever a separation of the GM Torrance employees from the GMA employees. After such meetings, there was never a training session for just the GM Torrance employees. Whether Julie Favata worked for GMA or GM Torrance, she always sent employees to the corporate office for training. Counselors and sales people of both GMA and GM Torrance were sent to the corporate office for training.

Julie Favata, and other witnesses, testified as to the Dem policies and Procedures. Dem is a Gloria Marshall Figure Salon term for demonstration. Dems were conducted at both GMA and GM Torrance salons. The sales person showed the prospective patron the exercise machines that included the circulation tables, treadmills, rollers, pulleys, etc. The sales person performed a figure analysis that consisted of actual measurements and the prospective patron's inch and weight loss goals. Additionally, the sales person completed the "Gloria Marshall Guaranteed Slimming Personalized Program" that included patron information, the contract, and the various charts measuring the patrons weight and inch loss progress.

The patron initialed the Visits Completed Chart before being weighed by salon personnel. Subsequently, when a patron obtained her weight or inches goal, the salon personnel prepared a Maintenance Program Weight Schedule (Exhibit 371). Training manuals and forms for counselors and sales personnel were the same or similar at GMA and GM Torrance salons.

Patrons at both GMA and GM Torrance salons were required to purchase a minimum number of sessions regardless of their need to lose weight. In addition, similar reprogramming techniques were employed.

Julie Favata testified that, during her entire experience in either GMA or GM Torrance salons, prospective patrons were told that the normal price was $7.50 for one half hour treatments. Prospective patrons would be offered a "special" or discount. However, none of the Gloria Marshall salons ever charged $7.50 for one-half hour session. Also, both GM and GM Torrance utilized the same "red flags" procedure when a patron gained weight.

"MANAGEMENT AGREEMENTS"

There were two "management agreements," that were discussed, one between GMA and GM Australia and another between GMFC and GM Australia. Under the GM/GM Australia agreement, employees of GMA would supply management consulting to GM Australia. Mark Bergendahl testified that he performed work under this agreement. Under the GMFC/GM Australia agreement, it would be the GMFC employees who would supply the management consulting to GM Australia. Mark Bergendahl testified that he worked under this agreement (Bob Barkatelly also worked under this agreement.).

Bob Barkatelly was an employee of GMFC. (Exhibit 20) While Mark Bergendahl testified that Bob Barkatelly had his

own accounting business, it is clear that Bob Barkatelly was mainly involved in the accounting for the Gloria Marshall entities. He always had a permanent office at the corporate locations and was paid by GMFC (Exhibit 570). Bob Barkatelly was listed as controller in the GMA Training Manual (Exhibit 28, page 094). Bob Barkatelly also made trips to Australia to handle the accounting work for GM Australia. Mark Bergendahl did not know who paid for such trips. Bob Barkatelly performed accounting work for GMA but was never paid by GMA. Bob Barkatelly also had check writing authority for GMA (Exhibits 264 and 265). Mark Bergendahl stated that Bob Barkatelly was waiting for GMA stock. However, it is clear that during the time Bob Barkatelly was performing accounting work for GMA, he was being paid by GMFC.

Patricia Townsend was also listed in Exhibit 20. In addition, she was paid by GMFC as a W-2 employee. (Exhibit 570) It is clear that she performed extensive services for GMA by way of the coordination of advertising. She acted as a contact for Jack Perkins when it came to discussions of advertising. She did receive some income from Redfield Taylor (Exhibit 569), however, by far most of her income came from GMFC. Pat Townsend also made business trips to Australia (Exhibit 192, page 176).

Ann Beasley was listed as a GMFC employee or independent contractor for GMFC (Exhibit 20). Yet, she was shown as being involved in GMA refunds (Exhibit 45). The same is true of Andrea Farina.

Kim Saalfeld performed account work for the Gloria Marshall entities including GMA. Yet she was paid by GMFC (Exhibit 570).

Mark Bergendahl testified that he did not know who paid certain employees identified in Exhibit 373. The shifting of employee duties was common.

Much like GMFC paying the lease expenses for GMA and the other entities, employees of GMFC, who derived most or all of their pay from GMFC, performed significant duties for GMA. This is a common thread; the large financially fit entity, GMFC, covering the under-capitalized entity.

GMFC's Purchase of GMA's Accounts Receivables

During cross-examination, Mark Bergendahl testified that GMA periodically sold accounts receivables (i.e., installment payments due under patron contracts) to GMFC. By this arrangement, GMA received cash to operate and not have to expend time and resources to collect on these payments, while GMFC received the unpaid balances at a discount. According to Mark Bergendahl, these sales of accounts receivables to GMFC were not made pursuant to any written agreement at any time. Gloria Sarno testified that GMFC paid 85% of the face value of these accounts receivables to GMA. She continued to purchase these contracts when GMA was clearly in financial distress with a steadily declining net worth.

David Weiner, a financial expert called by the defense, testified that while the sale of accounts receivables is not an unusual practice between unrelated entities, he would advise a purchaser to exercise caution if the payments for the accounts receivables were for services by the seller which had not yet been performed. As he further elaborated, he would also urge caution if the seller, such as GMA, was in such financial distress that its ability to provide services under the sold contracts was in doubt because if the seller folded, the buyer would be left with worthless "paper". Consequently, Mr. Weiner would advise a purchaser in such circumstances who nonetheless wished to proceed to buy the accounts receivables at a heavily discounted price.

Undercapitalization by GMA

Mark Bergendahl testified that he started GMA with

only $75,000, which came from his family, friends and his own money. His original design was to expand from his one salon location in Lakewood throughout Southern California. He was able to do, however, only with active financial assistance from GMFC and his mother. Both Prof. Stone and Mr. Weiner testified that the net worth of a business is its assets minus liabilities. According to Mr. Weiner, at least from 1991 to 1994, when the last salon closed, GMA experienced a steadily declining net worth.

On August 4, 1993, GMFC loaned $450,000 to GMA which was memorialized by a note (Exhibit 270, p. 15). Part of the collateral was GMA's pledge of its personal property, including its "equipment". The note provided that "...should GMA decide to close any of their retail locations (Salons) or an administrative office, GMFC, Inc. may, at its sole discretion, elect to call upon that portion of their collateral and assume possession and title thereto." As GMA was closing its salons, according to its own general ledgers and Mark Bergendahl, it sold its equipment - the collateral for the loan - to GM Utah, an entity that was also owned by Mark and Kellee Bergendahl. The note, which was prepared by Bob Barkatelly, the controller for GMA, GMFC, and GM Utah, has never been paid. GMFC made no demand to, nor even took any action against, GMA or GM Utah.

FTC ORDER AGAINST INTERNATIONAL SERVICE INDUSTRIES

This order arose from a Federal Trade Commission complaint against ISI, which was co-owned by Alan Bergendahl, Mrs. Sarno's first husband. Mrs. Sarno testified that the trademark of Gloria Marshall had been held by herself and issued to ISI. The FTC order was designed by its broad sweep to apply to as many entities and persons, both existing in 1974 and subsequently thereafter who would be connected to the operation of the Gloria Marshall Figure Salons, including successors and licensees. In 1982, Alan Bergendahl sold the

trademark, assets and good will to Nutrasystem. In 1987, Mrs. Sarno learned that Nutrasystem had abandoned the Gloria Marshall trademark. GMFC instituted legal proceedings and obtained the trademark back. GMFC issued the trademark to GMA. GMA's advertising is similar to some of the representations which are prohibited by the FTC's consent order.

AMENDING THE JUDGMENT

Code of Civil Procedure section 187 provides that "(w)hen jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the court of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most comfortable to the spirit of this Code."

In Dow Jones Co. v. Avenel (1984) 151 Cal.App.3d 144, 149, the Court of Appeal restated the recognized rule that "(a) trial court has the authority to amend a judgment in order to add additional judgment debtors. Code of Civil Procedure section 187 has often served as the basis for such an amendment of judgment, pursuant to the alter ego doctrine." The Dow Jones court devotes the bulk of its opinion to countering the argument presented by the purported alter ego, a corporation and its president and sole shareholder, that due process concerns require that "... the amended judgment follows a `trial on the merits,' whereas here they were added as judgment debtors without having had the opportunity to `litigate factual issues' behind the judgment." Ibid. Dismissing this contention, the Court noted that the attorneys who represented the named defendant also acted as counsel for the alter ego and "controlled the litigation." Id. at 151.

One authority has summarized the case law in this area as follows: "Control of the litigation sufficient to overcome due

process objections may consist of a combination of factors usually including the financing of the litigation, the hiring of attorneys, and control over the course of the litigation. IA Ballantine & Sterline Cal. Corporation Laws (4th ed.), section 299.04, pp. 14-45 - 14-46. Another key factor is whether the action is adequately defended by the named defendants. As the court in NEC Electronics Inc. v. Hurt (1989) 208 Cal.App.3d 772, 778-779 stated, "`[i]f the claim of individual liability is made at some later stage in the action, the judgment can be made individually binding on a person associated with the corporation only if the individual to be charged, personally or through a representative, had control of the litigation and occasion to conduct it with a diligence corresponding to the risk of personal liability that was involved.' (Citation omitted)." Similarly, in Mirabito v. San Francisco Dairy Co. (1935) 8 Cal.App.2d 54, 59, the court sustained an amendment to the judgment upon a showing that the alter ego corporation paid for the attorneys' fees and costs incurred by the named defendants, "the attorneys for one corporation were the attorneys for the other," and such attorneys vigorously asserted the separateness of the two. Moreover, the court reasoned that "[w]here ... the evidence is sufficient to warrant the conclusion that in effect the two corporations are identical; where ... the action was fully and fairly tried with at least the direct financial assistance of the [alter ego]; and where ... nothing appears in the record to show that [the alter ego] could have produced a scintilla of evidence that would have in any way affected the results of the trial, there is no basis for a different rule." Id. at 60.

By contrast in NEC Electronics, Inc., supra, the named defendant allowed the plaintiff to obtain a default judgment against it because it planned to file for bankruptcy. As the court noted, "This situation contrasts with the usual scenario where the interests of the corporate defendant and its alter ego are similar so that the trial strategy of the corporate defendant effectively represents the interests of the alter ego. At 780.

These three key factors – control of the litigation, a vigorous defense, and a similarity of interests between the named defendants and the alter ego – actually overlap each other. Applying them to the present action strongly tips the balance for allowing an amendment of the judgment against the named defendants to include as alter egos: (1) G.M.F.C., Inc., (2) Gloria Marshall Salon of Torrance, (3) Gloria Sarno (a.k.a. Gloria Marshall, Gloria Bergendahl), (4) Redfield Taylor Associates, Inc., (5) Gloria Marshall of Utah, Inc., (6) Gloria Marshall International, Inc., (7) Gloria Marshall Figure Salons of Australis Pty. Ltd., (8) G.M.F.C. (Aust.) Pty. Ltd., and (9) International Health Industries Ohio, Inc.

9. Control of the litigation:

A. Payment of legal fees: Mark Bergendahl testified that he owes over $100,000 in unpaid legal fees to his counsel, Nelson & Nelson, and that to date he has paid $40,000 which he obtained from loans from his family, and what remuneration he has earned since the close of GMA. Defense counsel Nelson & Nelson, and Robert Sainburg, have conducted a vigorous defense, filed numerous motions and other pleadings, and conducted over two dozen depositions. Either the defense is taking an enormous risk or has some reasonable expectation of payment. Mark Bergendahl is presently earning an income from Jacobson Larson, a family business wholly owned by his mother and which, according to Mark Bergendahl, is undercapitalized. Mrs. Sarno in her testimony described Jacobson Larson as a business devoted to providing consulting services to various Gloria Marshall entities including being a party to a management agreement with GM Australia. Throughout the history of GMA, Mark Bergendahl and Kellee Bergendahl combined never drew more than $24,000 a year as President of GMA. Nonetheless, both had a high-expense life style, living in fashionable neighborhoods of Orange County, driving expensive Jaguars and a Range Rover (which they still do), and purchasing a home with a value of over $700,000 while incurring a substantial mortgage. Mark Bergendahl's income

was not insubstantial during 1990-1994 for he received $50,000 - $80,000 annually from his position as Vice President of GMFC. GMFC had also engaged GMA to handle a management agreement with GM Australia. Yet both Mark and Kellee Bergendahl testified that throughout the course of this litigation, they have been essentially destitute. This raises the intriguing question of who will be paying for the services of Nelson & Nelson. Without the tremendous and ongoing support of Gloria Sarno, GM Australia, and GMFC, GMA would not have existed. Similarly, without the ability to continue to receive money from Gloria Marshall enterprises, Mark Bergendahl would not be able to pay off his legal fees. Certainly, at this present time, he is dependent upon his mother's business enterprises for future income.

B. Joint Counsel: Nelson & Nelson have acted as long-time counsel to Gloria Sarno, GMFC, and other Gloria Marshall enterprises. Robert Sainburg, another defense attorney, was identified at trial as a one-time employee/independent contractor of GMFC. During the course of this litigation, Nelson & Nelson vigorously opposed the attempts of plaintiff to obtain discovery from GMFC and GM Torrance, another of Mrs. Sarno's businesses which engaged in joint advertising with GMA on most occasions. This joint advertising forms the basis for many of the allegations in Plaintiff's Second Cause of Action. The efforts by Nelson & Nelson to resist Plaintiff's discovery requests proved unsuccessful with this Court issuing an order to Compel Production of Documents and imposing a $60,000 sanction award. Mrs. Sarno failed to show for her deposition in late 1996, and did so only after being ordered to appear by this Court. She did not retain the services of Shelden Lytton until just before her deposition, and only then when it was clear that plaintiff would inquire into the alter ego status of her businesses.

C. Involvement in the discovery process: Sheldon Lytton attended the deposition of Mark Bergendahl, and made

objections.

D. Involvement at trial: Mr. Lytton sought unsuccessfully to play an active role in the trial during Mrs. Sarno's direct examination for Plaintiff. He has conferred with Scott Frasier.

E. Settlement offers: Mr. Lytton has made settlement offers to Plaintiff's counsel.

F. Interference with a witness Julie Favata was a cooperative witness for Plaintiff during its investigation. She had information both to substantiating the allegations of the complaint, establishing that defendants had a policy of having patrons sign more than $1,000 for services, and most importantly, identifying additional aspects of an alter ego relationship between Mrs. Sarno's businesses and the named defendants. Prior to her deposition, Ms. Favata had filed a workers' compensation claim against Gloria Sarno and Gloria Marshall Torrance. This claim had been set for trial. One month after the first day of Ms. Favata's deposition, but before its resumption, this claim was settled, resulting in a $10,000 award to her. While the timing may have been pure happenstance, the Court can, and does, draw the inference that the settlement was related to her providing Plaintiff with damaging evidence. Ms. Favata was not a cooperative witness at trial, requiring Plaintiff to impeach her testimony on numerous occasions with testimony she rendered during her deposition.

G. Trial strategy: If the testimonies of the Bergendahls and Mrs. Sarno are to be believed, the former never talked to Mrs. Sarno about their business (except for one occasion, when Kellee Bergendahl spoke with Mrs. Sarno about modifying the Menu Planner) in any respect even though Mrs. Sarno and her enterprises supported the operation of GMA. In another attempt at distancing herself from the named defendants, Mrs. Sarno testified that she did not even know

who were the principals of GMA. In light of all of the other evidence establishing that Mrs. Sarno's enterprises, and particularly GMFC, were the alter egos of GMA, this evidence was incredible and unbelievable. Thus, there appeared to be a calculated and concerted effort at trial to cover up the relationships between the alleged alter egos and the named defendants.

H. An active defense: Clearly, the case here, with much of the defendants' efforts being devoted to excluding that evidence which establishes the similarity of the Bergendahls, who operate Gloria Marshall Figure Salons, and Mrs. Sarno, who also operates Gloria Marshall Figure Salons. Unlike the situation, for instance, in Motores De Mexicali v. Superior Court (1958) 541 Cal.2d 172, 196, where the named defendants, having gone into bankruptcy, allowed a default judgment to be entered against it, here the named defendants have fully litigated issues relating to both liability and alter ego.

I. Similarity of Interests: What makes this trial distinguishable from virtually every reported decision on amending judgments to include alter egos is that both counsel were allowed by the court to present evidence at trial on not just liability, but alter ego issues as well. Mrs. Sarno, for instance, was called as a witness by both sides. Had the alter egos been allowed to participate directly, the alter egos could not have produced any evidence that would have affected the outcome of the trial. Certainly, through the person of Mrs. Sarno, as examined by her long-time counsel, she had the opportunity to do so. This procedure went beyond that sanctioned in Dow Jones Co. v. Avenel, supra, 151 Cal.App.3d at 150.

The only remaining question for the Court on whether to allow the proposed amendment to the judgment is whether Plaintiff acted with due diligence to bring in the alter egos as defendants.

See Alexander v. Abbey of the Chines (1980) 104

Cal.App.3d 39, 48-49. Plaintiff had sought throughout the course of its discovery efforts to uncover sufficient evidence to name Mrs. Sarno all failed to show up for their individually scheduled depositions at the end of 1996, plaintiff immediately sought an order from this court to compel their attendance. Those depositions were not held until 1997. Following these depositions, Plaintiff sought unsuccessfully to file with this Court an Amended Complaint. Nothing in the record shows that the defendants have not acted with due diligence.

PERMANENT INJUNCTION

GOOD CAUSE APPEARING, AND IT APPEARING THAT THIS IS AN APPROPRIATE CASE FOR THE ISSUANCE OF A PERMANENT INJUNCTION, IT IS HEREBY ORDERED: That the injunctive provisions of this judgment are applicable to the offering of health studio services including but not limited to instruction, training or assistance in physical culture, body building, exercising, weight reduction, diet control, figure development, or any other such physical skill, or for the use by an individual patron of the facilities of a health studio, gymnasium, figure salon or other such facility used for any of the above purposes, or for membership in any group, club, association, salon or organization formed for any of the above purposes by defendants, and in connection therewith, to the principals, officers, directors, employees, agents, licensees, representatives, successors and assigns of defendants, and to all persons, partnerships, corporations, and other entities, acting for, through or on behalf of, or in concert or participation with defendants who have actual or constructive knowledge of this Judgment, and to the "alter ego" identified herein. Those identified in this paragraph may be referred to collectively hereafter as "defendants and others."

Pursuant to Business and Professions Code sections 17200, 17203, 17500, and 17535, defendants and others are from the date of entry of this judgment, permanently enjoined and restrained from, directly or indirectly, engaging in the following

acts or practices in connection with any matter related to health studio services:

9. Failing to make pro rata refunds, based upon the patron's actual usage of health studio services, if a health studio closes.

10. Providing a contract to a patron for health studio services, with provisions for the relief of payment for services to occur in the event the patron moves further than 25 miles from the health studio, and such patron is unable to transfer the contract to a comparable facility, that requires that patron to submit a computer generated utility bill with her name at the new address or requires her to acquire and submit any other documentation evidencing such move unless defendants prorate the amount of the refunds from the date of her move.

11. Inserting a clause in a health studio services contract with a provision for the relief of payment for services, to occur in the event that a patron moves further than 25 miles from the health studio, and such patron is unable to transfer the contract to a comparable facility, that such person may be charged a predetermined fee, unless defendants further disclose that the fee may not exceed one hundred dollars $100), or, if more than half the life of the contract has expired, such person may be charged a predetermined fee not exceeding fifty dollars ($50), in violation of Civil Code section 1812.89(b)(2).

12. Provide contracts to patrons for health studio services that:

A. Offer for sale the Gloria Marshall Quick

Trim Menu Plan, Strategy Planner, Quick Trim Meal Replacement, or any related or similar products and make said products non-refundable, in violation of Civil Code section 1812.85(b)(4), 1812.89(a)(1), 1812.89(a)(2), and 1812.89(b)(1). Defendants shall have no obligation to issue a refund for the Quick Trim Meal Replacement if the packaging has been open, torn or damaged, or otherwise shows any sign of tampering or adulteration. Defendants may not deduct from any refund a purported cost for the Gloria Marshall Quick Trim Menu Plan, Strategy Planner, or any other related or similar products for which a patron has not paid any money under he contract.

B. Require patrons to pay a surcharge for using a credit card in lieu of payment by cash, check, or similar means, in violation of Civil Code section 1748.1(a).

C. Impose a twenty-five dollar ($25) administrative fee, in violation of Civil Code sections 1812.85(b)(1) and 1812.85(b)(4), if a patron exercises her three-day right to rescind or cancel the contract.

D. Require a patron to include a copy of her contract along with a notice of cancellation, in violation of Civil Code sections 1812.85(b)(1).

E. Include a definition of disability other than the definition set forth in Civil Code section 1812.89(a)(3), or create any

procedure or formula for calculation of refunds, in violation of Civil Code section 1812.89(a)(2), that obligates a patron who has a physical or mental impairment that prevents her from using the services to pay for the missed services, or denies a refund to a patron for that period of time that she was physically or mentally impaired.

F. Impose a twenty-five ($25) administrative fee on refunds to those patrons or their estates who are unable to use the health studio services because of death or disability, in violation of Civil Code section 1812.89(a)(2).

5. Subtracting any amount from a refund unless specifically permitted to do so pursuant to Civil Code section 182.80 et seq.

6. Selling any pre-packaged food, drink, meal replacement or any other food, drink, or dietary supplement unless the patron is informed in her contract that she is not required to purchase the food or drink or dietary supplement.

7. Advertising or otherwise representing the price of a session for health studio services in any manner other than stating the price of a one-hour session.

8. Offering a contract for health studio services that obligates a person to pay one thousand dollars ($1,000), exclusive of interest and finance charges. For purposes of this paragraph, all contracts for health studio services, which may be in effect between defendants and the same buyer, the terms of which overlap for any period, shall be considered as one contract.

9. Making any oral, visual or written representation, in connection with the offering of health studio services, that states or implies that patrons will lose, or lose up to, a specific number of inches or pounds, unless defendants maintain a comprehensive survey that substantiates the weight or inches reduction representations.

10. Making any oral, visual, or written representation, in connection with the offering of health studio services, that states or implies that a particular patron or patron lost specific numbers of inches or pounds unless defendants and other disclose clearly and conspicuously that the weight or inches lost by said patron or patrons is not what consumers should expect to experience.

11. Making any oral, visual, or written representation, in connection with the offering of health studio services, that states or implies that results are guaranteed unless defendants and others disclose clearly, adequately, and accurately in immediate conjunction therewith:

A. The nature and extent of the guarantee;

B. The conditions and limitations on the guarantee;

C. Which programs are guarantees;

D. The duration of the guarantee

E. The manner in which defendants will perform

12. Selling the Quick Trim Meal Replacement or any related or similar product, if defendants and other make any oral, visual, or written representations, in connection with the offering of health studio services, that there are no pre-packaged foods or no pre-packaged foods offered or required for a

patron's participation in the health studio's weight reduction services.

13. Requiring payment for a minimum or specific number of sessions for health studio services unless the sessions offered represent the total sessions necessary for a patron to achieve her goal weight.

CIVIL PENALTIES

With respect to allegations in the First Cause of Action which have been sustained by this court, Business and Professions Code section 17206 provides "(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) ..." section 17206(b) states, "The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth." With respect to allegations of deceptive or untrue representations in the Second Cause of Action which have been sustained by this court, Business and Professions Code section 17536(a) and (b) mirrors the language of section 17206.

A court must assess civil penalties when it finds that acts of unfair competition have been committed. The burden is on the defendant to establish any financial inability to pay requested civil penalties. People v. Toomey (1984) 157 Cal.App.3d 1, 25.

Civil penalties for violations of sections 17500 are treated somewhat differently, since sections 17536 and 17206

specifically allow for cumulative remedies indicating a legislative intent to allow double penalties. People v. Toomey, supra, at 25. Thus, a violation of section 17500 is also a violation of section 17200, as was pleaded by plaintiff in its complaint; the civil penalty for each violation sustained is $5,000. "What constitutes a single violation of section 17500 (false advertising) for the purpose of imposing a civil penalty under section 17536 depends on the type of violation involved, the number of victims and the repetition of the conduct constituting the violation in brief, the circumstances of the case ..." One civil penalty is imposed for each person solicited to whom misrepresentations were made. People v. Witzerman, Ibid., People v. Superior Court (Jayhill) (1973) 9 Cal.3d 283, 288.

By any calculation, the amount of civil penalties which can be imposed in this matter would be astronomical, since it would include all of the unlawful contract provisions and the number of contracts which contained those provisions (Exhibits 90-183), all instances of failure to make proper refunds, as well as the readership of the various newspapers that carried defendants' advertisements. Accordingly, the Court orders payment of civil penalties on a joint and severable basis in the amount of $200,000.

RESTITUTION

Business and Professions Code sections 17203 and 17535 authorize a court "... to make such orders or judgments ... which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice [in these chapters] declared to be unlawful."

The court orders that defendants set up a restitution fund in the amount of $200,000 from which defendants shall make payment to the following:

1. All persons entitled to refunds as the result of

salon closures who had received a partial refund based upon pro rata use. Such refunds shall be based upon actual usage.

2. All persons entitled to refunds as the result of salon closures who have not received any payment from defendants. Such refunds shall be based upon actual usage.

3. Beatrice Baca, in the amount of $480.00.

4. Patricia Haro, in the amount of $400.00

One hundred twenty (120) days following this Order of the Court, defendants shall present to the court a list setting forth the names of persons to whom refunds have been made, and the amounts of refund made to each. Thereafter, upon further order of this court, any remaining moneys remaining in the restitution funds shall revert to the defendants.

Dated: Oct 30 1997

/s/
REGINALD A. DUNN
Judge of the Superior Court

CONSTITUTIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of

any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. (italics added)

CALIFORNIA CODE OF CIVIL PROCEDURE § 187. JURISDICTION; MEANS TO CARRY INTO EFFECT; MODE OF PROCEEDING:

When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

West's Ann. Cal. C.C.P. § 187

FEDERAL QUESTIONS RAISED

Original Complaint filed with the Superior Court of California for the County of Los Angeles, December 21, 1998, Case No. BC202691:

> "13. Plaintiffs were never named prior to the entry of the judgment itself, were denied their request to have a legal representative defend their interests, were denied their requests to be present during the trial, were never served with a summons, were never given an opportunity to be heard in connection with their being named in the judgment as a purported alter ego of the named defendants, were never notified of any proceeding to add plaintiffs to the Judgment ostensibly pursuant to Code of Civil Procedure Section 187, *were denied extremely basic and fundamental procedural and substantive due process rights guaranteed under the United States* and California Constitutions...and the subject judgment entered under these conditions is void, unenforceable and subject to be set aside upon requests of the defendants (sic) based upon established principles of equity." (italics added)

Opposition to Demurrer of Defendant People of the State of California to First Amended Complaint filed with the Superior Court of California for the County of Los Angeles, January 20, 1999, Case No. BC202691:

> "Discussion of Authorities I. UNITED STATES AND CALIFORNIA CONSTITUTIONS BOTH REQUIRE JURISDICTION, DUE PROCESS, FUNDAMENTAL FAIRNESS, NOTICE AND OPPORTUNITY TO BE HEARD (uppercase and underscoring in original)
>
> "`...nor shall any state deprive any person of life, liberty or property, without due process of law...' United States Constitution, Amendment XIV, Section 1

"...

"`Engrained in our concept of due process is the requirement of notice.' Lambert v. California (1958) 355 U.S. 225, 78 S.Ct. 240, 243, 2 L.Ed.2d 228, 231

"...

"These [Fourteenth Amendment] prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities.' Scott v. McNeal (1894) 154 U.S. 34, 45, 14 S.Ct. 1108, 1112, 38 L.Ed. 896, 901

"`No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.' id. at 46"

Appellants' Opening Brief filed with the Second District Court of Appeal of the State of California, November 9, 1999, Case No. B130037:

"Introduction. The United States Constitution states, "...nor shall any state deprive any person of life, liberty or property, without Due Process of law...." (U.S. Const. Amdmt XIV, §1) A judgment that violates this fundamental principle of constitutional law is void and may be collaterally attacked anytime." (p.1)"

"In all 1405 pages of the Joint Appendix and the 3 pages of the Reporter's Transcript, and most importantly, from the allegations of the First Amended Complaint against which People's Demurrer was sustained without leave to amend..., at no time was Sarno ever named in the lawsuit, added as a party to the lawsuit by amended complaint, motion, or post-judgment motion to add a defendant pursuant to Code of Civil Procedure §187, served with a summons, served with an Order to Show Cause why Sarno should not be added,

served with a notice of hearing on a motion to add Sarno, provided an opportunity to be heard, whether it be in the form of a trial, hearing, or by declaration, provided an opportunity to cross-examine witnesses, confront witnesses, or meet any evidence presented, be present during the trial involving People and the original defendants, have their attorney present during the trial, or, in any other way, receive notice and any meaningful opportunity to be heard. There was not even an ex-parte application to add Sarno....No notice. No opportunity to be heard. No due process. Just added at the end of the trial. ¶ People have taken C.C.P. §187 to the next step, beyond the protections of the Due Process Clause, and claim that proposed additional debtors may be added without any notice or opportunity to be heard (because after all, People argue, if the Judge determines pursuant to that statute that the judgment debtor to be added was `one and the same' as the original defendants, then the judgment debtor obviously already had its trial! This is blatantly unconstitutional." (pps. 23-4)

"Every single case that is reported demonstrates that the engine of the United States Constitution does not stop when the motor of C.C.P. §187 is turned on." (p. 30)

Appellants' Reply Brief filed with the Second District Court of Appeal of the State of California, April 11, 2000, Case No. B130037:

"Discussion of Authorities. I. Appellants' Constitutional Rights are Not Dependent on the Evidence Produced or Not Produced in the Original Action.....The right to be heard does not require an advance showing that one will prevail at the hearing, and the particular would be outcome of the denied hearing is irrelevant...Coe v. Armour Fertilizer Works (1915) 237 U.S. 413...." (p.1-2)

Petition for Rehearing and Request for Publication filed in the Second District Court of Appeal for the State of California, May 24, 2000, Case No. B130037:

"Discussion of Authorities I. The United States Supreme Court's Decision in Nelson v. Adams Governs and Requires Reversal Two days prior to oral argument, a unanimous United States Supreme Court decided the case of Donald E. Nelson v. Adams USA, Inc. (April 25, 2000) 2000 Daily Journal D.A.R. 4225. This case is controlling. Further, this case, to the extent that reversal was not already mandated based upon the points and authorities in Appellants' Opening and Reply Briefs, mandates a reversal of the trial court's dismissal of Appellants' complaint. ¶ In Nelson...." (p.1-2)

Petition for Review filed in the Supreme Court of the State of California, June 19, 2000, Case No. S089232:

"Issues Presented 1. Whether the holding of - or, the Court of Appeal's interpretation of - Mirabito v. San Francisco Dairy Co. (1935) 8 Cal.App.2d 54 is consistent with the holding of Donald E. Nelson v. Adams USA, Inc. (April 25, 2000)...which requires persons be afforded the opportunity to contest liability to another. 2. Whether applying California's Code of Civil Procedure §187 to allow the entry of judgment against persons never named as parties, served with a summons, complaint or motion, or given any opportunity by declaration, hearing or otherwise, to present evidence and argument in their defense is consistent with the United States and California Constitutions and the holding of Donald E. Nelson v. Adams USA, Inc. (April 25, 2000) 2000 Daily Journal D.A.R. 4225, (No. 99-502), 2000 WL 459282 (United States Supreme Court)." (p.2)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

GLORIA SARNO a/k/a Gloria Marshall, a/k/a Gloria Bergendahl, an individual; G.M.F.C., a California corporation; GLORIA MARSHALL SALON OF TORRANCE, a California general partnership; GLORIA MARSHALL FIGURE SALONS OF AUSTRALIA PTY. LTD., an Australian corporation; and G.M.F.C. (Aust.) PTY. LTD., an Australian Corporation, Plaintiffs, v. STATE OF CALIFORNIA, a public entity; COUNTY OF LOS ANGELES, a public entity;	CASE NO. BC 202 691 Assigned to: Hon. Richard Kalustian Department 17 FIRST AMENDED COMPLAINT IN EQUITY TO SET ASIDE JUDGMENT, AND FOR DECLARATORY AND INJUNCTIVE RELIEF Action filed: Original pleading Trial date: Not set

PEOPLE OF THE STATE OF CALIFORNIA; LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; and DOES 1 through 5, inclusive,

Defendants

Plaintiffs allege as follows:

FIRST CAUSE OF ACTION
(In Equity to Set Aside Judgment)

By all Plaintiffs against Defendants STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, PEOPLE OF STATE OF CALIFORNIA AND DOES 1 through 5, inclusive

1. Plaintiff GLORIA SARNO is, and at all times relevant mentioned herein was, an individual residing in the County of Los Angeles, State of California. At various times in the past, said plaintiff has also been known as "Gloria Marshall," (her maiden name) and "Gloria Bergendahl" (the name of her late husband).

2. Plaintiff G.M.F.C., Inc. is, and at all relevant times mentioned herein was, a corporation formed, organized and exiting under the laws of the State of California.

3. Plaintiff GLORIA MARSHALL SALON OF TORRANCE was at all relevant times a California general partnership.

4. Plaintiff GLORIA MARSHALL FIGURE SALONS OF AUSTRALIA, PTY. LTD. is, and at all relevant times was, an Australian Corporation, organized, existing

and operating under the laws of the country of Australia.

5. Plaintiff G.M.F.C. (Aust.) Pty. Ltd. is, and at all relevant times was, an Australian Corporation, organized, existing and operating under the laws of the country of Australia.

6. Defendant STATE OF CALIFORNIA is, and at all relevant times as, a public entity, and at all relevant times appeared by and through its legal representatives, California Attorney General's Office.

6a. Defendant COUNTY OF LOS ANGELES is, and at all relevant times, was, a public entity, and at all relevant times appeared by and through its legal representatives, Los Angeles County District Attorney's Office.

6b. Defendant PEOPLE OF THE STATE OF CALIFORNIA is, and at all relevant times as, a body of public.

6c. Defendant LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, is, and at all relevant times was, a public entity and is the levying officer for the County of Los Angeles.

7. Plaintiffs are ignorant of the true names and capacities of Defendants sued herein as DOES 1 through 5, inclusive, and therefore sues these Defendants as such fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is responsible for the occurrences herein alleged, and the damages are proximately caused by their conduct.

8. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the

defendants was acting as an individual and/or as the agent and/or employee of the remaining defendants and, in doing the things herein alleged, was acting within the course and scope of their authority as agent and employee and with the permission and consent of the remaining defendants.

9. On or about February 14, 1995, Defendants, in the name of "People of the State of California" (hereinafter simply referred to as "Plaintiff in Original Action") through its legal representatives commenced a lawsuit against the following defendants:

1. Gloria Marshall America, Inc.
2. FBS, Inc.
3. Mark Bergendahl
4. Kellee Bergendahl
5. Does 1 through 20, inclusive.

That lawsuit was given case number BC 162313 and was filed in the Central District of the Superior Court of California for the County of Los Angeles (hereinafter simply referred to as "Original Action").

10. On or about March 6, 1997, with the trial scheduled to commence April 7, 1997, Plaintiff in Original Action filed a Motion for leave to file a Second Amended Complaint for the purposes of adding as new defendants in the Original Action the plaintiffs herein and for the purpose of setting forth allegations necessary to pierce the corporate veil of Defendant F.B.S., Inc. This motion was denied.

11. Plaintiffs herein appeared with their attorney, Sheldon H. Lytton, of Kelly & Lytton to protect Plaintiffs' legal interests arising out of the Original Action during the trial of the Original Action. The Superior Court denied Plaintiffs herein the right to

have an attorney participate at the trial because they were not named defendants. The Superior Court also excluded these plaintiffs herein from being present in the Courtroom at anytime during the trial except for when the parties of the Original Action subpoenaed their testimony.

12. At the conclusion of the trial, the Court entered a judgment in favor of Plaintiff of the Original Action and against the defendants of the original action and the plaintiffs herein for monetary damages in the sum of $200,000, restitution to consumers in the sum of $200,000, and a permanent injunction.

13. Plaintiffs were never named prior to the entry of the judgment itself, were denied their request to have a legal representative defend their interests, were denied their requests to be present during the trial, were never served with a summons, were never given an opportunity to be heard in connection with their being named in the judgment as a purported alter ego of the named defendants, were never notified of any proceeding to add plaintiffs to the Judgment ostensibly pursuant to Code of Civil Procedure Section 187, were denied extremely basic and fundamental procedural and substantive due process rights guaranteed under the United States and California Constitutions, as well as California statutory and case law, and the subject judgment entered under these conditions is void, unenforceable and subject to be set aside upon request of the defendants based upon established principles of equity.

14. Plaintiffs have been subject to aggressive collection maneuvers by Defendants and has been deprived of property in an amount according to proof at the time of trial. Plaintiffs are entitled to restitution of all

amounts collected pursuant to this judgment, interest at the legal rate thereon, and such further relief as proved at the time of trial hereon.

SECOND CAUSE OF ACTION
(Declaratory Relief)

By all Plaintiffs against Defendants STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, PEOPLE OF STATE OF CALIFORNIA, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT and DOES 1 through 5, inclusive

15. Plaintiffs incorporate and reallege all preceding paragraphs of this Complaint as though they had been fully set forth below.

16. An actual controversy has arisen and now exists between Plaintiff and Defendants concerning their respective rights and duties in that Plaintiff contends as follows:

A. The Judgment entered in the Original Action is void for lack of jurisdiction, unenforceable and subject to being set aside at any time.

B. The auction currently scheduled for January 14, 1999 of the 1981 boat owned by Plaintiff GLORIA SARNO, is unlawful and without jurisdiction to proceed.

17. Defendants claim that the Judgment entered in the Original Action is not void, is unenforceable and is not subject to be set aside and that the auction is lawful and with jurisdiction to proceed.

18. Plaintiffs desire a judicial determination of their rights and duties, and a declaration as to whether the Judgment entered in the Original Action is void and unenforceable.

19. A judicial determination is necessary and appropriate at this time under the circumstances in order that Plaintiffs may ascertain their rights and duties under the Judgment, if any. Plaintiffs are being subjected to aggressive collection maneuvers by Defendants including an immediate threat of auctioning Plaintiff GLORIA SARNO'S yacht and attempting to compel Plaintiff GLORIA SARNO to pay over $80,000 currently being held in an attorney-client trust account as restitution pursuant to the Judgment to members of the public.

THIRD CAUSE OF ACTION
(Declaratory Relief)

By all Plaintiffs against Defendants STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, PEOPLE OF STATE OF CALIFORNIA, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT and DOES 1 through 5, inclusive

20. Plaintiffs incorporate and reallege all preceding paragraphs of this Complaint as though they had been fully set forth below.

21. Pursuant to the Judgment in the Original Action, said defendants caused the Los Angeles County Sheriff's Department to levy on Plaintiff GLORIA SARNO's 1981 yacht, 56 feet 9 inches, gross tons 68 tons, plus all inventory. The Sheriff seized said yacht and gave notice of an execution sale. This sale was subsequently continued after Eldorado Bank duly fled a verified third party claim with the Sheriff due to a duly recorded lien it held against the yacht in a sum of about $175,000. Thereafter, by stipulation between Defendants and the third party claimant, the sale was continued to January 14, 1999 with a minimum bid of $198,000. The yacht has an apx. fair market value of between $175,000 and $225,000 at this time and has been in the family of GLORIA SARNO for about eighteen years.

22. In several occasions, forums, and communications, Plaintiffs have sought Defendants to case or suspend their

threatened conduct yet Defendants have refused and have persisted with their aggressive collection efforts and still refuse to refrain from their threatened conduct.

23. Permanent and provisional injunctive relief is in order because in the absence of this restraint, the sale of the yacht will cause great and irreparable harm by Plaintiff GLORIA SARNO and her family, the judgment in this case will be rendered wholly or mostly ineffectual, that pecuniary compensation would not afford adequate relief and it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief, and the restraint is necessary to prevent a multiplicity of judicial proceedings.

WHEREFORE, Plaintiff prays Judgment as follows:

A. That the "Amended Judgment" be vacated, set aside, and declared void for lack of jurisdiction.
B. Restitution according to proof.
C. Pre-judgment Interest according to proof.
D. For a declaration that the Judgment is void and unenforceable.
E. For a permanent injunction enjoining Defendants from enforcing the Judgment of the Original Action.
F. For costs of suit incurred herein.
G. For such other and further relief as the Court deems just, proper and fair in order to accomplish substantive justice.

Dated: 1/11/99

LAW OFFICES OF
RICHARD E. ELDRED

By: _____
Richard E. Eldred

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Attorneys for Plaintiff
People of the State of California

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	No. BC 121888
	)	
	)	NOTICE OF ENTRY OF JUDGMENT
Plaintiff,	)	[CCP § 664.5(a)]
	)	
v.	)	Hon Reginald A. Dunn
	)	
GLORIA MARSHALL AMERICA, INC.; FBS, INC.; MARK BERGENDAHL;	)	Dept.: 44

KELLEE BERGENDAHL,)
)
Defendants.)

TO: DEFENDANTS GLORIA MARSHALL AMERICA, INC., MARK BERGENDAHL, KELLEE BERGENDAHL, AND THEIR COUNSEL OF RECORD, E. SCOTT FRASER, AND TO GLORIA SARNO (AKA GLORIA MARSHALL, GLORIA BERGENDAHL), G.M.F.C., INC., GLORIA MARSHALL SALON OF TORRANCE, REDFIELD TAYLOR & ASSOCIATES, INC., GLORIA MARSHALL OF UTAH, INC., GLORIA MARSHALL INTERNATIONAL, INC., GLORIA MARSHALL FIGURE SALONS OF AUSTRALIA PTY. LTD., G.M.F.C. (AUST.) PTY. LTD., AND INTERNATIONAL HEALTH INDUSTRIES OHIO, INC.:

NOTICE IS HERBY GIVEN that on February 24, 1998, judgment was entered in the above-entitled action in favor of plaintiff, the People of the State of California, and against defendants Gloria Marshall America, Inc., Mark Bergendahl, and Kellee Bergendahl, and Gloria Sarno (aka Gloria Marshall, Gloria Bergendahl), G.M.F.C., Inc., Gloria Marshall Salon of Torrance, Redfield Taylor & Associates, Inc., Gloria Marshall of Utah, Inc., Gloria Marshall International, Inc., Gloria Marshall Figure Salons of Australia Pty. Ltd., G.M.F.C. (Aust.) Pty. Ltd., and International Health Industries Ohio, Inc.

Dated: March 3, 1998

DANIEL E. LUNGREN, Attorney General
of the State of California
HERSCHEL T. ELKINS,
Senior Assistant Attorney General
JERRY SMILOWITZ,
Deputy Attorney General
By: /s/
JERRY SMILOWITZ

Attorneys for Plaintiff
People of the State of California

DECLARATION OF SERVICE BY MAIL

PEOPLE OF THE STATE OF CALIFORNIA v. GLORIA MARSHALL AMERICA, INC.;
FBS, INC.; MARK BERGENDAHL; and KELLEE BERGENDAHL.

Los Angeles County Superior Court No. BC 121888

I declare as follows:

I am over the age of 18 years and not a party to the within action. My business address is 300 South Spring Street, Suite 5000-North, Los Angeles, California 90013-1204, in the County of Los Angeles.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal service that same day in the ordinary course of business.

On March 3, 1998, at my place of business, at Los Angeles, California, a true coy of the attached

NOTICE OF ENTRY OF JUDGMENT
[CCP § 664.5(a)]

was placed for collection in the United States Postal Service at the Office of the Attorney General, 300 South Spring Street, Suite 5000-North, Los Angeles, California 90013-1204, in a sealed envelope, postage fully prepaid, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the

State of California that the foregoing is true and correct, and that this declaration was executed at Los Angeles, California, on March 3, 1998.

Delphine Maxwell

JS:dm
00002-450-LA1997N0710

SERVICE LIST ATTACHMENT

PEOPLE OF THE STATE OF CALIFORNIA v. GLORIA MARSHALL AMERICA, INC.; FBS, INC.; MARK BERGENDAHL; and KELLEE BERGENDAHL.

Los Angeles County Superior Court No. BC 121888

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